Supreme Court, U.S.
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88-1878

No. ____,

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

JAMES SAFFLE, WARDEN,
OKLAHOMA STATE PENITENTIARY,
GARY MAYNARD, DIRECTOR
OKLAHOMA DEPARTMENT OF
CORRECTIONS,
ROBERT H. HENRY,
ATTORNEY GENERAL OF
OKLAHOMA,

Petitioners,

vs.

CHARLES WILLIAM DAVIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May, 1989
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QUESTION PRESENTED

Whether in the sentencing phase of a capital murder prosecution the Eighth

Amendment prohibits an "anti-sympathy" jury instruction which states, in pertinent part:

> You should not allow sympathy, sentiment or prejudice to affect you in reaching your decision. You should avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence.

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The Attorney General of Oklahoma, Robert H. Henry, on behalf of the Warden of the Oklahoma State Penitentiary, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The judgment and opinion of the Court of Appeals (Appendix A, submitted herewith) is reported as Davis v. Maynard, ___ F.2d _____ (10th Cir. March 14, 1989). The opinion of the District Court (Appendix B, submitted herewith) is not reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, submitted herewith) was entered on March 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT

Respondent, hereinafter Defendant, was convicted of murdering his wife's brother and another man in an incident in which he also wounded his wife and another of her brothers. Defendant was sentenced to die in the District Court of Oklahoma County, Oklahoma. After

exhausting his state remedies, Defendant sought a writ of habeas corpus in the United States District Court for the Western District of Oklahoma under 28 U.S.C. § 2254. After the district court denied the writ the Defendant appealed to the United States Court of Appeals for the Tenth Circuit. A three judge panel of that court affirmed the district court's denial of habeas relief, but reversed with respect to the district court's denial of all further relief, specifically declaring the death sentence invalid due to: 1) error under the rule of Maynard v. Cartwright, 108 S.Ct. 1853 (1988)[1] and 2) error under

[1] The Tenth Circuit left it to the state court to address in the first instance whether the deaths in the instant case could be categorized under a restricted application of the "especially heinous, atrocious or cruel" aggravating circumstance or whether any

the rule of Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) (en banc) by finding sentencing phase Jury Instruction No. 13 (the "anti-sympathy" instruction) violated the Defendant's rights under the Eighth Amendment. Davis v. Maynard, App. A at 46-49.

Such a finding by the Tenth Circuit reversed the decision of the district court that the "instruction does not preclude consideration of any evidence regarding any aspect of the petitioner's character or record or any of the circumstances of the crimes offered by the petitioner as a basis for a sentence of less than death." App. B at 13.

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error from findings of such circumstance could be construed as harmless. App. A at 53-54. Thus, that issue is not brought to this Court for review at this time.

During the sentencing proceedings at Defendant's trial, Defendant himself testified of his love for his wife as well as introduced a tape-recorded statement in which he expressed his feelings for her. Other witnesses testified regarding their observations of Defendant's love for his wife. Additionally, Defendant's probation officer testified. The trial court did not exclude any mitigating evidence offered by the Defendant during the sentencing proceedings.

With regard to mitigating circumstances, Instruction No. 6 in the sentencing phase stated:

> You are instructed that mitigating circumstances are not specifically enumerated in the statutes of this State, but the law of this State sets up certain minimum mitigating circumstances you shall follow as guidelines in determining which sentence you

impose in this case. You shall consider any or all of these minimum mitigating circumstances which you find apply to the facts and circumstances of this case. You are not limited in your consideration to these minimum mitigating circumstances. You may consider any additional mitigating circumstances, if any, you find from the evidence in this case. What are and what are not additional mitigating circumstances is for you the jury to determine.

The following things, if true, could be considered as provided by law:

1. The defendant has no significant history of prior criminal activity;

2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

3. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct;

4. The defendant acted under duress or under the domination of another person;

5. At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or intoxication;

6. The age of the defendant at the time of the crime.

Instruction No. 13 in the sentencing phase stated in part:

> You should not allow sympathy, sentiment or prejudice to affect you in reaching your decision. You should avoid any influence of passion, prejudice or any other arbitrary factor when imposing sentence. You should do your duties as jurors as you sworn [sic] you would do.

During the closing argument the prosecutor discussed that the jury must consider the four aggravating circumstances alleged and determine that at least one existed to consider the death penalty. As well the prosecutor

emphasized that the jury must consider the mitigating circumstances presented and determine whether they outweigh mitigrating circumstances (Tr. 884-87). The chief prosecutor mentioned that the jury should not let sympathy affect its judgment in order to reach an impartial decision. (Tr. 896, 908). As well he informed the jury that "you can consider anything in mitigation" and discussed mitigating circumstances enumerated in Instruction No. 6 (Tr. 904-906).

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the application of the Eighth Amendment to capital murder sentencing proceedings. The Court below held unconstitutional the "anti-sympathy" jury instruction because it

believed the instruction created an impermissible risk that the jury did not fully consider the Defendant's mitigating evidence in making its sentencing decision, even though both the trial court and the prosecutor had instructed the jury that it must consider the mitigating evidence.

In reaching its decision the court below relied upon its pronouncement in Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) (en banc). Importantly this Court on April 24, 1989, granted the State of Oklahoma's Petition for a Writ of Certiorari in that case. Saffle v. Parks, No. 88-1264. The conclusion of the Tenth Circuit in both the instant case and Parks v. Brown, 860 F.2d at 1545 cannot be reconciled with this Court's opinion in California v. Brown,

479 U.S. 538 (1987). Further, the opinions of the Tenth Circuit are in conflict with the decision of the Fifth Circuit in Byrne v. Butler, 847 F.2d 1135 (5th Cir. 1988), with the opinion of the Ohio Supreme Court in State v. Steffen, 509 N.E.2d 383, 396 (Ohio 1987), cert. denied, 108 S.Ct. 1089 (1988), and with the decision of the Supreme Court of Louisiana in Louisiana v. Copeland, 530 So.2d 526 (La. 1988).

The Constitution does not require sympathy in capital sentencing.

In California v. Brown, 479 U.S. 538 (1987) the Court summarized the Eighth Amendment law of capital punishment as requiring, first, death penalty statutes be structured so as to prevent the penalty from being administered in and unpredictable fashion, and second, the

court stated that a capital defendant must be allowed to introduce any relevant mitigating evidence regarding his character or record and any of the circumstances of the offense as a constitutionally indispensable part of the process of inflicting the penalty of death. Id., 479 U.S. at 541. To these two Eighth Amendment prerequisites to a valid death sentence a narrow majority of the Tenth Circuit, speaking through Judge Ebel, has added a right to appeal for mercy, humane treatment, compassion, and sympathy. 860 F.2d at 1556. While this is not a case in which the defense was precluded from introducing mitigating evidence or the jury was precluded from considering that evidence, the Tenth Circuit struck down the anti-sympathy instruction because it

found that instruction created an impermissible risk that the jury did not fully consider the Defendant's mitigating evidence in making its sentencing decision. App. A at 48-49. The court below additionally stated that evidence-based sympathy is a valid sentencing consideration. App. A at 47-48. Thus, the court below entered the realm of the mental and emotional processes of jurors to create a constitutional requirement that sentencing jurors not merely consider mitigating factors but "fully consider" them with a sympathetic attitude.

Although not articulated by the majority opinion in Parks v. Brown, 860 F.2d at 1545, Judge McKay's opinion in that case, concurring and dissenting in part, articulates what may be an

underlying premise of the majority's opinion. Judge McKay called this the Parks crime an "ordinary murder case" in which the imposition of the death penalty strongly suggests the jury conducted its task improperly. Opinion of McKay, J., concurring in part and dissenting in part, 860 F.2d at 1562. The Parks majority may have believed that "something" had to go wrong to result in the death penalty for an "ordinary murder" and that "something" was a failure of the jury to adequately consider the defendant's case in mitigation. Thus, resentencing was necessary, even though the trial court in no way impeded the Defendant's case in mitigation.

In the present case the Tenth Circuit simply cited to its Parks en banc

opinion, despite the fact that the instruction given in this case did not specifically admonish the jury to avoid any influence of sympathy when imposing sentence. We believe this special scrutiny of "ordinary murders" presents an extreme danger that appellate federal courts will substitute their views of "ordinary murder" cases for those of the jurors who hear the case, even in the absence of interference with the case in mitigation. Moreover, Petitioners contend that the murders of Dennis McLaughlin and Robert Jones were not ordinary, particularly as defendant had been convicted previously of murder.

We believe the opinion of the court below cannot be squared with the requirement of California v. Brown, supra, that the proper focus is on what

a reasonable juror could have understood the charge to mean. Id., 479 U.S. at 541. To determine how a reasonable juror could interpret an instruction, we must focus initially on the specific language challenged and, if that language fails constitutional muster, we then review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law. Id., 479 U.S. at 541. The Tenth Circuit in Parks v. Brown, 860 F.2d at 1553-54, ignored almost all of this court's opinion in Brown, and distinguished the jury instruction in Parks v. Brown, id. from the California instruction upheld in Brown because the latter instruction prohibited "mere" sympathy, while the instruction in Parks advises jurors to avoid "any influence of sympathy,

sentiment, passion, prejudice" or other arbitrary factors. Id., at 1552. We believe this distinction is one which would escape a lay juror. This is particularly true in the instant case where sympathy is not enumerated in the "anti-sympathy" instruction as one of the emotions to avoid in sentencing.

Instruction No. 6 in the sentencing phase, set out above, advised the jury in no uncertain terms that it must consider not only certain minimum mitigating circumstances but that jurors may consider any other or additional mitigating circumstances, if any, that they found from the evidence to exist in the case. The prosecutor further informed the jurors of their obligation to consider the mitigating evidence and touched on each of the specific

"minimum" mitigating circumstances in turn and told the jurors that they could consider anything else that they want to, to mitigate the penalty of death and the term of life (Tr. 904-06). Thus, the jurors were informed by both the court and the prosecutor to consider the Defendant's case in mitigation but to do so impartially, conscientiously, and faithfully under their oaths and to return such verdict as the evidence warrants when measured by these instructions.

In light of the evidence, argument, and instructions on mitigating evidence, no reasonable juror would interpret the admonition to avoid the influence of passion and prejudice as a secret code designed to denigrate the Defendant's case in mitigation. Rather, as was the

case in Brown, a reasonable juror would consider sympathy, sentiment, passion, and prejudice to be no more than a catalogue of the kind of factors that could improperly influence their decision to vote for or against the death penalty. Id., 479 U.S. at 543. The trial court instructed the jury against passion, prejudice, or any other arbitrary factor when imposing sentence and further informed the jurors that they should discharge their duty impartially, conscientiously, and faithfully under their oaths. Thus, the instruction directed the jurors away from extraneous emotional factors and toward an impartial and conscientious performance of their duties based upon the evidence. As in Brown, the challenged instruction serves the useful

purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors. Also, the instruction limits the jury's consideration to matters introduced in evidence before it fostering the Eighth Amendment's need for reliability in the determination that death is the appropriate punishment in a specific case. Id., 479 U.S. at 543. Likewise, by limiting the jury's sentencing consideration to record evidence, the instruction also insures the availability of meaningful judicial review which is another safeguard that improves the reliability of the sentencing process. Id., 479 U.S. at 543. Finally, as in Brown, an instruction toward an impartial and

conscientious verdict and away from emotion is far more likely to benefit a capital murder defendant than to harm him. Id., 479 U.S. at 543.

At his trial the Defendant received individualized consideration of his mitigating circumstances and was no way restricted in his ability to introduce mitigating evidence or to argue mitigation to the jury. Yet the court below has now imposed as an Eighth Amendment requirement the necessity of the jury to not only consider the mitigating evidence but to "fully consider" the mitigating evidence with an attitude of sympathy. Yet the court below points to no evidence in the record, or plausible reason to believe, that the jury actually did not "fully consider" Defendant's mitigating

evidence. Short of deposing the jury such evidence would be impossible to find. Thus, the court below justifies its ruling by the impermissible risk the jury did not "fully consider" the mitigating evidence. This heightened requirement of full consideration by a sympathetic jury is a step backwards from this Court's long-standing commitment that capital sentencing be, and appear to be, based on reason rather than caprice or emotion. As Judge Anderson correctly stated in writing for himself and the three other dissenting judges in Parks v. Brown, 860 F.2d at 1569-70:

> The requirement that sentencing decisions must be rational has been emphasized over and over again by the Supreme Court since Furman v. Georgia, 408 U.S. 238 (1972).

In Gardner v. Florida, 430 U.S. 349, 358 (1976), the Court stated: "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." That standard has been referred to repeatedly by the Court in its later decisions. Sumner v. Shuman, 107 S.Ct. 2716, 2723, n.5 (1987) ("sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime" quoting California v. Brown, 107 S.Ct. at 841 (O'Connor, J., concur- ring)); Booth v. Maryland, 107 S.Ct. at 2536 ("[A]ny decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion.'", quoting Gardner v. Florida, 430 U.S. at 358; "reasoned decision making" required in capital cases); McCleskey v. Kemp, 107 S.Ct. 1756, 1789 (1987) ("[W]e have demanded a uniquely high degree of rationality in imposing the death penalty." (Brennan, dissenting)); Caldwell v. Mississippi, 472 U.S. 320 (1985) ("[M]any of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise

of sentencing discretion." Id. at 329; "[T]his Court has gone to extraordinary measures to insure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." Id. at 329, n.2, quoting Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring)); Pulley v. Harris, 465 U.S. 37, 53 (1984) (upholding the constitutionality of a state statute which guaranteed that the jury's discretion will be guided and its consideration "deliberate"); California v. Ramos, 463 U.S. 992, 1018-21 (1983) (Marshall, dissenting) (capital punishment decisions must be "rational," "meaningful," "principled," and "reliable"); Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (death sentence must be based on reason rather than caprice or emotion, quoting Gardner v. Florida, 430 U.S. at 358); Beck v. Alabama, 447 U.S. 625, 637-38 (1980) (reason rather than caprice or emotion required); Gregg v. Georgia, 428 U.S. 153, 190 (1976) ("reasoned determination" by a jury); Jurek v. Texas, 428 U.S. 262, 274 (1976) (Texas procedure "guides and focuses the jury's objective consideration of the particularized circumstances of

> the individual offense and the individual offender.") (emphasis supplied); Proffitt v. Florida, 428 U.S. 242, 259 (1975) ("[T]here shall be an informed, focused, guided, and objective inquiry into the question whether [a convicted person] should be sentenced to death.").

Judge Anderson and the dissenting judges in Parks agreed with Justice O'Connor that the sentencing posed at the penalty stage should reflect a reasoned moral response to the Defendant's background, character, and crime rather than mere sympathy or emotion Id., at 1569. We likewise agree that the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the guilt of the defendant and not an emotional response to the mitigating evidence. Id. As we have demonstrated, nothing in these sentencing proceedings

mislead the jury into believing that it should not consider the Defendant's case in mitigation. Quite the contrary, even the prosecutor reinforced the jury's duty to consider the evidence in mitigation. The Defendant was sentenced in a proceeding which guided and directed the jury sentencing discretion and which he could submit to the jury his case in mitigation without interference by the court. The Constitution requires no more.

The court in Parks v. Brown misapplied Mills v. Maryland, 108 S.Ct. 1860 (1988). In Mills the verdict form was ambiguous and could reasonably be read in two ways, one of which could result in a verdict of death when jurors found mitigating circumstances were present but did not agree unanimously on

which mitigating factors were present in the case. Id., 100 L.Ed.2d at 394. This Court found a substantial possibility that the verdict rested on the improper ground and remanded for resentencing. Id., 100 L.Ed.2d at 395-96. The Tenth Circuit applied this "substantial possibility" language to an entirely different circumstance and remanded for resentencing because the jury verdict in this case may have rested on the "improper" (i.e. non-sympathetic) ground Parks v. Brown, 860 F.2d at 1557. Unlike in Mills, the juries in Parks and in the present case were not in danger of being tricked into disregarding each Defendant's case in mitigation. The admonition against passion, and prejudice, and in favor of an impartial and conscientious discharge

of their duty as jurors could not be construed by a reasonable juror as an instruction to disregard the case in mitigation. Thus, the instruction passes constitutional muster and the court below erred in striking it down.

Even if Instruction No. 13 were unconstitutional, a proposition we obviously contest, following the second stage of this Court's formula from Brown, we must review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law. Id., 479 U.S. at 541. Instruction No. 6 unquestionably did correctly instruct the jury that they must consider not only the six listed "minimum" mitigating circumstances but any other or additional mitigating circumstances they might find from the

evidence to exist in the case. Thus, the Defendant received the "constitutionally indispensable" consideration of his mitigating evidence during the sentencing. Id., 479 U.S. at 541. The Defendant received the prerequisites the Eighth Amendment imposes upon a valid death sentence. The court below departed from this Court's pronouncement in California v. Brown, supra, and imposed yet a third prerequisite based upon the sheer speculation that the jury may not have "fully considered" the Defendant's case in mitigation. We respectfully ask this Court to grant our Petition for Writ of Certiorari and review and reverse the decision of the court below upon determination of the similar issue in Saffle v. Parks, No. 88-1264.

The decision of the court below will disrupt the administration of criminal justice.

In striking down the "anti-sympathy" instruction, an instruction which even-handedly prohibited passion or prejudice either for or against the Defendant, the court below has sent a message to the defense bar that appeals to sympathy on behalf of their Defendants are not only permissible but may be constitutionally required to be heard by trial courts. If the opinion of the court below is upheld, trial courts will be unable to restrict emotional appeals on behalf of Defendants for fear of committing constitutionally reversible error. Two further results, neither of which are desirable, may obtain. First, prosecutors may feel they have a license to make pleas for sympathy for victims

or families, at least so long as that sympathy is "tethered" to the evidence of the crime. Secondly, prosecutors may be foreclosed from making a countervailing emotional plea under the accusation that sympathy is the exclusive province of the defendant and sentiment, passion, and prejudice are constitutionally improper. In either event, capital sentencing will sink into the realm of the emotional rather than relying upon the objective factors which have characterized this Court's opinions on capital sentencing.

Further, because this instruction, or instructions like it, are common in capital sentencing in Oklahoma, the opinion of the court below will have an impact going far beyond the specific cases of Robyn Parks and Charles William

Davis. The already protracted process of constitutional litigation will be further delayed if the opinions of Parks v. Brown, 860 F.2d at 1545, and its progeny stands. Many condemned murderers may ultimately be released because their jurors may not have "fully considered" their cases in mitigation with the proper sympathetic frame of mind. To a general public already bewildered by the inability of the courts to do justice in capital cases such a result will only make worse the growing disrespect of the public for our courts.

The decision of the court below creates a split in the circuits.

In Byrne v. Butler, 847 F.2d 1135, 1139-40 (5th Cir. 1988), the Fifth Circuit, by adopting the reasoning of

the district court, came to precisely the opposite conclusion as did the court below in analyzing an "anti-sympathy" instruction. Contrary to the Tenth Circuit, the Fifth Circuit held that this Court in California v. Brown, supra, did not hold that the qualifier "mere" was necessary to avoid a constitutional violation. Byrne, supra, 847 F.2d at 1139. The court in Byrne, relying on California v. Brown, found that the trial court's admonition to the jury not to be influenced by sympathy, passion, prejudice or public opinion did not limit the jury consideration of mitigating circumstances. Id., 847 F.2d at 1137, 1139-40.

Further, the Ohio Supreme Court has rejected a challenge to a jury instruction to disregard feelings of

sympathy in penalty phase deliberations, relying in part on California v. Brown, supra. State v. Steffen, 509 N.E.2d 383, 396, cert. denied 108 S.Ct. 1089 (1988). The Court in Steffen, also relied on its earlier cases, one of which, State v. Scott, 497 N.E.2d 55, 68 (Ohio 1986), cert. denied, 107 S.Ct. 1386 (1987) which upheld an "anti-sympathy" instruction which stated:

> You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the Court to your findings, and to render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

497 N.E.2d at 68. Such instructions are no less forceful than the Oklahoma instruction invalidated by the Tenth Circuit. Yet, despite the absence of the talismanic word "mere" modifying "sympathy" the Ohio Supreme Court has found they pass constitutional muster.

The opinion of the Fifth Circuit in Byrne, by adopting the district court opinion, also relied upon an opinion of the Louisiana Supreme Court, State v. Copeland, 530 So.2d 526, 537 (La. 1988). Byrne, supra, 847 F.2d at 1140. The Louisiana Supreme Court in Copeland, dealt with a guilt phase instruction which stated that the jury was not to be influenced by sympathy, passion, prejudice, or public opinion and was to reach a just verdict. The Court stated that a similar instruction, if given

during the penalty phase, does not unduly prejudice a defendant relying, on two of its earlier opinions and this Court's opinion in California v. Brown. Thus, while the Louisiana Supreme Court in Copeland did not face a sentencing phase instruction it indicated clearly that it would find such an instruction constitutionally permissible. Copeland, supra, 530 So.2d at 537.

Writing for the dissent in Parks v. Brown, 860 F.2d at 1570, Judge Anderson stated that the majority's disagreement with the Fifth Circuit in Byrne goes farther than splitting the circuits and represents an extreme position lacking any support at all in existing cases. The circuits are clearly split and the Fifth Circuit's approach is the correct one. The Tenth Circuit California v.

Brown, supra, an opinion approving an anti-sympathy instruction, and turned it into an opinion compelling the conclusion that the present instruction is unconstitutional despite the absence of the word "sympathy" as an emotion to be avoided in imposing sentence and because of the absence of the word "mere" to modify sympathy as an emotion to be given no effect when reaching the jury's decision. We ask this Court to grant a Writ of Certiorari as it has in Saffle v. Parks, No. 88-1264, to resolve this split in the circuits between the Tenth and Fifth Circuits in favor of the position adopted by the Fifth Circuit.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, particularly as this Court recently granted certiorari in the case of Saffle v. Parks, No. 88-1264.

Respectfully submitted,

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PENITENTIARY

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Respondent.

APPENDIX A TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May, 1989
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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CHARLES WILLIAM DAVIS,	)
	)
Petitioner-Appellant,	)
	)
vs.	)
	)
GARY MAYNARD, Warden, Oklahoma State Penitentiary at McAlester Oklahoma,	)
	)
Respondent-Appellee.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-86-1202W)

Robert A. Ravitz, Public Defender, Oklahoma County Public Defender's Office, Oklahoma City, Oklahoma, for Petitioner-Appellant.

Susan Stewart Dickerson, Assistant Attorney General (Robert H. Henry,

Attorney General of Oklahoma, with her on the brief), Oklahoma City, Oklahoma, for Respondent-Appellee.

Before MOORE and BALDOCK, Circuit Judges, and O'CONNOR, District Judge.*

BALDOCK, Circuit Judge.

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* The Honorable Earl E. O'Connor, Chief Judge, United States District Court for the District of Kansas, sitting by designation.

Petitioner-appellant, Charles William Davis, was charged by information in the District Court of Oklahoma County, Oklahoma, with the first degree murders of Dennis McLaughlin and Robert Wayne Jones in violation of 21 Okla. Stat, § 701.7. The State alleged that on the morning of August 13, 1977, Davis mortally wounded McLaughlin and Jones with a .38 caliber pistol at his home in Oklahoma City. The cases, CRF-77-2905 and CRF-77-2906, were consolidated, and trial ensued on February 21, 1978. On February 27, 1978, the jury returned a verdict of guilty. Later that day, the jury in a separate proceeding under 21 Okla. Stat. § 701.10, sentenced Davis to death.

Davis at the time of the incident was

a fifty-two year old parolee from the State of Missouri. He had been convicted there in 1942 of murder in the first degree and sentenced to life imprisonment. On June 22, 1977, Davis married twenty-four year old Kathy Mae Rogers. She lived with him at his apartment in Oklahoma City for twelve days before moving back to her prior home in Sapulpa, Oklahoma, on August 3. At around 5:30 a.m. on August 13, 1977, Kathy returned to the apartment along with her brothers, Henry and Robert Wayne Jones, and a friend, Dennis McLaughlin, to gather her personal belongings which Davis had threatened to burn. Davis was at home when they arrived. After the four had completed packing Kathy's belongings onto Henry's truck, they returned to the apartment

for a final check. Davis, who was outside at that moment, then entered the apartment holding a gun. Kathy testified that Davis said "I thought I told you to bring the car back," and fired. Trial Tr. at 348. (Kathy and Davis had purchased a car which Kathy subsequently wrecked in Sapulpa). Davis continued to aim and pull the trigger even after all available rounds were spent. Kathy and Henry were each shot once in the head but survived. Dennis McLaughlin died as a result of two gunshot wounds through the head. Robert Wayne Jones suffered fatal gunshot wounds to the head and back. Davis immediately fled the scene. He was apprehended carrying a loaded .38 caliber pistol in California two days later.

Davis' sole defense at trial was self-defense. Although firearms were never visible on any of the four, Davis testified that immediately prior to the shooting, he believed both Henry and Dennis were reaching for concealed weapons. As a result, Davis opened fire. Davis claimed that he loved Kathy and did not intend to kill anyone. His probation officer testified, however, that while Davis stated he believed the murders were justified, "he would rather that Kathy had died." Trial Tr. at 858.

Davis unsuccessfully appealed his conviction and sentence to the Oklahoma Court of Criminal Appeals. Davis v. State, 665 P.2d 1186 (Okla. Cr.), cert. denied, 464 U.S. 865 (1983). He then unsuccessfully sought relief under the State's "Post-Conviction Procedure Act,"

22 Okla. Stat. §§ 1080-88. Davis v. State, Nos. CRF-77-2905 & CRF-77-2906 (D. Ct. Okla. Cty. Dec. 28, 1984), aff'd, No. PC-85-55 (Okla. Cr. March 21, 1985), cert. denied, 475 U.S. 1098 (1986). Having exhausted his available state court remedies as prescribed by 28 U.S.C. § 2254(b), Davis filed this action under § 2254(a) in the Western District of Oklahoma seeking a writ of habeas corpus. In a thorough opinion, the district court denied Davis relief.

Upon a certificate of probable cause pursuant to Fed. R. App. P. 22(b), Davis appeals from the judgment of the district court alleging seven state trial errors of constitutional magnitude. See 28 U.S.C. § 2254(a) (federal court shall entertain application for a writ only on ground

that petitioner is incarcerated in violation of the Constitution or laws of the United States). Davis claims, as he has throughout the course of post-trial review, that (1) the jury instructions tendered in the guilt phase of his trial improperly shifted the burden of proof, (2) the trial court improperly denied his request for a psychiatric examination at state expense to assist in his defense, (3) the trial court improperly excluded for cause members of the venire based upon their response to inquiries about the death penalty, (4) the prosecutor's closing argument in the sentencing phase of his trial improperly diluted the jury's sense of responsibility for the sentence imposed, (5) the jury instructions tendered in the sentencing phase of his trial

improperly defined the nature and function of mitigating circumstances, (6) the anti-sympathy instruction improperly led the jury to discount mitigating evidence presented in the sentencing phase of his trial, and (7) the State applied the "especially heinous, atrocious or cruel" aggravating circumstance instruction in an improperly vague and overbroad manner. Our jurisdiction to review these points arises under 28 U.S.C. § 2253. We affirm the denial of the writ but vacate the sentence of death as constitutionally impermissible on the record before us.

I.

Davis' only challenge to his conviction is aimed at the instructions provided the jury in the guilt phase of

his trial. According to Davis, certain instructions required him to come forth with evidence to reduce the homicides from first degree murder to manslaughter in violation of the rule established in In re Winship, 397 U.S. 358, 364 (1970), that "the Due Process Clause protects the accused against a conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In deciding the role that the contested instructions played in Davis' conviction, we are mindful that instructions "may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v. Naughten, 414 U.S. 141, 146-47 (1973). The burden § 2254 imposes upon Davis is not insignificant:

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned.'"

Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (quoting Cupp, 414 U.S. at 146-47); accord Hunt v. State, 683 F.2d 1305, 1310 (10th Cir. 1982). Because we find no such error in the instructions to the jury in the guilt phase of Davis' trial, we sustain his conviction.

The trial court in this case instructed the jury on first degree murder and first degree manslaughter, as well as self-defense, as defined by

Oklahoma law. After informing the jury in instruction three of the presumption of innocence, and of the State's burden to prove Davis guilty beyond a reasonable doubt, the court defined the elements of each offense. In instruction five, the court first quoted the definition of murder contained in 21 Okla. Stat. § 701.7: "A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being." In the same instruction, malice was defined as a "deliberate intention, a premeditated design to take away the life of a human being which is manifested by external circumstances capable of proof." The court then charged the jury in instruction seven that the crime of murder in Oklahoma

embraces the lesser included offense of manslaughter: "[T]he statutes of this State define homicide as manslaughter in the first degree when perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitutes justifiable homicide." See 21 Okla. Stat. § 711. The court defined "heat of passion" in instruction eight as "anger, rage, resentment, fear or terror," and stated: "In order to reduce a homicide to first degree manslaughter, this passion must have existed to such a degree as would naturally destroy the sway of reason and render the mind incapable of cool reflection, and thus exclude malice aforethought." In

instruction ten, the court distinguished malice from heat of passion and charged the jury that "[m]alice and heat of passion cannot co-exist."

Davis' claim that instruction 5A placed an unconstitutional burden upon him to show the absence of a "design to effect death" is nonsense. Instruction 5A reads:

> You are further instructed that a design to effect death may be inferred from the fact of the killing when that killing is done by the use of a dangerous weapon in such a manner as naturally and probably to cause death unless the circumstances raise a reasonable doubt whether such design existed [emphasis added].

The instruction contains the "entirely permissive inference or presumption, which allows--but does not require--the trier of fact to infer the elemental fact from proof by the prosecutor of the

basic one and which places no burden of any kind on the defendant." County Court v. Allen, 442 U.S. 140, 157 (1979). In other words, the jury could properly find a "design to effect death" based upon the circumstances surrounding the killings. But the jury was equally free to reject the inference if it found that the predicate facts proved by the State did not justify the suggested conclusion. Thus, the burden of proof did not shift to Davis. Francis v. Franklin, 471 U.S. 307, 314 (1985). A permissive inference transgresses due process "only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." Id. at 314-15. Because a rational trier of fact could easily conclude that Davis

possessed a "design to effect death" based upon the underlying facts proven at his trial, we find no error in instruction 5A. See Allen, 442 U.S. 163-67.

Davis' argument that instructions eight and nine required him to present evidence to reduce the homicides from first degree murder to manslaughter is similarly meritless. These instructions respectively described the terms "heat of passion" and "adequate provocation" as used in the definition of manslaughter set forth in instruction seven. Both admittedly spoke in terms of the elements necessary to "reduce" a first degree murder to manslaughter. And while we do not condone the instructions' terminology, neither these instructions nor any others created a

mandatory rebuttable presumption requiring the jury to find malice aforethought upon proof of certain predicate facts unless Davis persuaded the jury that he acted in the heat of passion and with adequate provocation. Compare Mullaney v. Wilbur, 421 U.S. 684 686-87, 703-04 (1975) (defendant's conviction could not stand where jury was instructed that if prosecution established that homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless defendant proved by a preponderance of the evidence that he acted in the heat of passion on sudden provocation). The instructions considered in their entirety placed upon the State the affirmative duty of proving malice aforethought beyond a

reasonable doubt. If the jury determined that the State had failed to meet its burden in that regard, the jury was instructed to consider whether the government's evidence established the elements of manslaughter beyond a reasonable doubt. Instructions eight and nine merely attempted to clarify for the jury the distinction between murder and manslaughter. Moreover, instruction ten directed the jury to consider "all the surrounding circumstances and conditions . . . including previous relations and conditions connected with the tragedy as well as those existing at the time of the killing" before determining whether Davis acted in the heat of passion or with malice. In this case, the instructions did not impose any burden whatsoever on Davis by

requiring the jury to presume. the elements of the crime upon proof of predicate facts, but rather placed upon the State the burden of proving every element of first degree murder beyond a reasonable doubt.

Davis' reliance on our decision in United States v. Lofton, 776 F.2d 918 (10th Cir. 1985), is misplaced. Davis claims Lofton supports his argument that in every first degree murder case where malice aforethought is an element of the crime, the jury must be instructed in haec verba that the government has the burden of proving the absence of heat of passion. We do not read Lofton so broadly. Lofton arose from a defendant's direct appeal of his murder conviction under 18 U.S.C. 1111(a). Although the defendant's sole defense at

trial was that she acted in the heat of passion on adequate provocation, the trial court failed to instruct the jury on her theory of defense or even distinguish heat of passion and malice as inconsistent mental states. Based on these facts, we held that "a defendant in a federal murder case who has sufficiently raised a heat of passion defense is entitled to instructions informing the jury of the theory of defense and of the Government's duty to prove beyond a reasonable doubt the absence of heat of passion in order to obtain a murder conviction." Id. at 920.

Aside from the two cases' procedural differences, Davis, unlike Lofton, never raised the heat of passion defense at his trial. Instead, his sole defense was self-defense. The instruction on

manslaughter presumably was given because under Oklahoma law, that crime is a lesser included offense of first degree murder. Whether such an instruction under the facts of this case was warranted is debatable. Cf. United States v. Scafe, 822 F.2d 928, 932-33 (10th Cir. 1987) (where evidence would not permit a rational jury to find defendant guilty of a lesser offense, instruction on that offense is unnecessary). But the instructions in this case, unlike those in Lofton, explicitly defined malice and heat of passion as mutually exclusive. The jury's finding of malice necessarily implies the absence of heat of passion. At least where the defense is not squarely raised and the instructions properly define the differing mental

states, the jury need not be instructed specifically that the prosecution must prove the absence of heat of passion when the element of malice is neither presumed nor required to be disproved by the defendant. See United States v. Molina-Uribe, 853 F.2d 1193, 1200-05 (5th Cir. 1988). We are convinced that the record developed in the guilt phase of Davis' trial "establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed." Rose v. Clark, 478 U.S. 570, 579 (1986).

II.

Davis' second contention concerns the State's refusal to provide him funds for a psychiatric examination designed to assist in the presentation of mitigating evidence in the sentencing phase of his

trial. In Ake v. Oklahoma, 470 U.S. 68, 83 (1985), the Supreme Court held that when a defendant demonstrates to the trial judge that his mental capacity "is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Because Ake's insanity defense was based upon fact rather than unsupported allegations, and the State's case relied heavily upon expert testimony concerning Ake's continuing criminal threat to society, the Court concluded that due process entitled Ake to the assistance of a psychiatrist.

In this case, a judge during a pre-

trial hearing originally ordered that Davis be examined at a state hospital, but the hospital refused to admit him in the absence of a statutory basis for the judge's ruling. On the day of trial, the trial judge denied Davis' motion for a continuance on the testimony of the hearing judge that the requested examination was not necessary to ensure a fair trial: "My thinking was that it's not one of those things that is necessarily necessary, but it would sure be nice to have if you were a Defendant in a first degree murder case." Motion Tr. at 24; see also id. at 25.

Davis' motion for a psychiatric examination was based on a general allegation of need without substantive supporting facts and contained "little

more than undeveloped assertions that the requested assistance would be beneficial." Caldwell v. Mississippi, 472 U.S. 320, 323-24 n.1 (1985). We recently stated that "[i]n order for a defendant's mental state to become a substantial threshold issue, the showing must be clear and genuine, one that constitutes a 'close' question which may well be decided one way or the other." Cartwright v. Maynard, 802 F.2d 1203, 1211 (10th Cir. 1986), vacated in part on other grounds, 822 F.2d 1477, 1478 n.2 (1987), aff'd, 108 S. Ct. 1853 (1988). In this case, Davis wholly failed to demonstrate that his mental capacity presented a substantial issue for trial. Davis' counsel admitted his client did not suffer from any mental disease. Trial Tr. at 877. Nor,

contrary to Ake, did the issue of Davis' "future dangerousness" play a role in the sentencing phase of his trial. The State presented no psychiatric testimony on that issue, and the jury failed to find as an aggravating circumstance that Davis constituted a continuing threat to society. We find no error in the State's refusal to assist Davis in obtaining a psychiatric evaluation.

III.

Davis next contends the trial judge's exclusion for cause of certain venire members contravened his sixth amendment right to an impartial jury in the sentencing phase of his trial. In Witherspoon v. Illinois, 391 U.S. 510, 522-23 n.21 (1968), the Supreme Court held that potential jurors could be excused for cause when their opposition

to the death penalty "automatically" would lead them to vote against a sentence of death or would impair their task of determining defendant's guilt or innocence. The Court, however, subsequently modified Witherspoon's holding in Adams v. Texas, 448 U.S. 38, 45 (1980), when it held that "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 426-30 (1985), later confirmed that a trial judge's factual determination regarding a potential juror's bias under the Adams' standard should be afforded a presumption of correctness in accordance

with 28 U.S.C. § 2254(d). Unless the defendant produces clear and convincing evidence of an erroneous factual determination, the death sentence should remain undisturbed. Id. at 435. "[T]he question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record." Id. at 434.

Davis has objected throughout these proceedings to the exclusion for cause of venire members Hearst, Musgrave, Dragus, Rockel and Metiver. The trial judge began by asking each potential juror the following question: "In a case where the law and evidence warrant, in a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death

Penalty?" Trial Tr. at 138, 220, 224, 227, 289. Unless the venire member's reply was unequivocally yes, the judge then asked:

> If you found beyond a reasonable doubt that the Defendant in this case was guilty of Murder in the First Degree and if under the evidence, facts and circumstances of the case the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case, you would not inflict the Death Penalty?

Id. at 144, 221, 224, 227, 289-90. Hearst answered "I believe I could" in response to the first inquiry, id. at 138, but when asked to be more specific and questioned further by both the trial judge and defense counsel, he eventually answered "I'm afraid that is true" in response to the second inquiry, id. at

144. Musgrave similarly answered "I believe I could" to the first question, but when asked the same question again responded "I don't believe I could." Id. at 220-21. She then answered "no" to the second inquiry. However, in response to defense counsel's question: "Do I hear that to mean that you could possibly impose the Death Penalty in some particular case?", Musgrave said "yes." Id. at 221-22. Metivier stated she had problems with imposing the death penalty, id. at 289, and specifically answered "no" to the judge's second inquiry. Id. at 290. Dragus' and Rockel's responses to questions about the death penalty were likewise equivocal. See id. at 224-29.

The voir dire to which Davis objects is indeed troublesome. Under Adams, 448

U.S. at 49-50, the proper inquiry is whether prospective jurors are willing and able to follow the court's instructions and obey their oaths, regardless of their personal feelings about the death penalty. Consequently, the trial judge's first question to the venire members is of little relevance. Withersooon, 391 U.S. at 515-16 n.9, recognized that 'conscientious or religious scruples' against infliction of the death penalty have little to do with whether a juror could vote to impose such a sentence in a case where the law and evidence warranted: "Obviously many jurors could notwithstanding their conscientious scruples against capital punishment, return a verdict of death and make their scruples subservient to their duty as

jurors." The second question, while a better attempt to incorporate the proper standard, is confusing, and because of its negative phrasing, invites ambiguous answers. For instance, does "no" mean that the jurors' reservations about the death penalty would not impair their ability to inflict the sentence in a proper case, or does "no" mean that the jurors would not inflict the death penalty despite the law and evidence? The dissenting judge on the Court of Criminal Appeals aptly noted: "This voir dire is replete with confusion." Davis, 665 P.2d at 1204-05 (Brett, J., dissenting in part). Nevertheless, we are not prepared to conclude on this record that the venire members' exclusion for cause constitutes reversible error.

In Witt, 469 U.S. at 424-26, the Court established that prospective jurors' bias towards the death penalty need not be proved with "unmistakable clarity" before they could be excluded for cause:

> [D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

The trial judge's assessment of the prospective jurors' demeanor and credibility is not easily discernible from the written record. Thus, where some ambiguity appears in the record, the judge, considering the questioning as a whole and using his sound discretion, was entitled to resolve the issue of juror bias in favor of the State. Id. at 428-29, 434-35; accord Darden v. Wainwright, 477 U.S. 168, 175-78 (1986)

Relying on Witt, we recently upheld in Coleman v. Brown, 802 F.2d 1227, 1231-32 (1986), cert. denied, 107 S. Ct. 2491 (1987), four prospective jurors' challenge for cause under questions and answers very similar to those at issue here. We agree with Coleman that "the Witt Court ceded a great deal of

authority to state trial judges to determine whether a juror should be excluded." Id. at 1232. Affording the trial judge's findings in this instance a "presumption of correctness," we conclude that he properly found the challenged venire members' views likely to "prevent or substantially impair" the performance of their duties as jurors.

IV.

Davis' challenge to the prosecutor's closing argument in the sentencing phase of his trial is likewise unavailing. According to Davis, the prosecutor played on the jurors' passions and downgraded their sense of responsibility for the sentencing decision in violation of the eighth amendment. The eighth amendment requires that a death sentence depend upon a complete assessment of

each case's individual circumstances. Coleman, 802 F.2d at 1239. Therefore, comments which tend to evoke a wholly emotional response from the jury or dilute the serious nature of the sentencing process may give rise to constitutional error. Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985).

Davis first claims the following comments led the jury to believe responsibility for the sentencing decision rested elsewhere:

> You know, you're not sitting there as individual people that you are in your other walks of life. You are as a body. A juror. And you perform a part of this system just as I do. Just as Justice Cook--Judge Cook does.
>
> And just as the Justices on the Supreme Court in reviewing Death Penalty cases, as Mr. Stuart suggests do. So all of us all along the system have responsibilities and duties, and each of us and all of us along the

> way have to have the courage to stand up for what we believe in.
> . . .
> But each of us are simply a part of a system that is greater than any of us are. And more important really than any of us are.

Trial Tr. at 895-96. We find nothing in these remarks, however, which rises to constitutional error.

In Dutton v. Brown, 812 F.2d 593, 596-97 (10th Cir.) (en banc), cert. denied, 108 S. Ct. 116 (1987), we rejected a constitutional challenge to similar comments and noted: "The statement was not designed to, nor did it, suggest to the jury that it was not ultimately responsible for deciding Mr. Dutton's punishment. The prosecutor merely underscored that the jury was part of the whole system of justice, and within that system it had a grave

responsibility." In that case, the prosecutor had told the jurors that they were "part of the process" and were "not functioning as individuals."

Similarly, in Parks v. Brown, 860 F.2d 1545, 1549-52 (1988) (en banc), we again rejected the notion that comments which emphasized the jury's part in the criminal justice system transgress the Constitution. In Parks, the prosecutor had stressed that the jury was "just part of the criminal-justice system." We held that the prosecutor's comments did not mislead the jury "into thinking it had a reduced role in the sentencing process." Id. at 1550 (quoting Darden, 477 U.S. at 184 n.15). Like the remarks in Dutton and Parks, the prosecutor's comments in this case did not unconstitutionally diminish the jury's

sense of responsibility for its sentencing decision. While the remarks may have been intended to place the jury's role in perspective, they certainly did not lessen the jury's perception of its duty.

Davis also contends that other comments by the prosecutor diverted the jurors' attention from the facts of his case and aroused arbitrary emotional responses against him. Specifically, Davis focuses on the following comments:

> [Y]ou cannot commit crimes of this kind with impunity. And a life sentence for this man isn't punitive. We tried that already. And it didn't work. Where does that leave us to go? What else can we do? What other alternative is there? You know how Charlie is. You have seen him up here. You have seen him talk to people. Do you think he will serve any time at all? He suggests it wouldn't happen. We are asking you to take--to enter a Death Penalty provision which will ultimately take his life, and you

> say that is a heavy thing to do.
>
> I suppose you don't do it, and you pick up the morning paper in a month or a week of five years, and he has killed somebody else. How do you live with that? How do you say to yourself: You know, if I had had the courage to do what was right and what the evidence compels and what the law requires, if I had had the courage to do it then, it wouldn't have happened.
>
> Not only is there the distinct possibility that by coming out and saying no more, that you might deter others from this act . . . .

Trial Tr. at 906-07. Despite Davis contrary assertion, these remarks are permissible.

In Coleman, 802 F.2d at 1239, we recognized that where future dangerousness is an aggravating circumstance under state law which, if found, may lead to imposition of the death penalty, comments about a defendant's future dangerousness and his

chances of rehabilitation are proper. Under 21 Okla. Stat. § 701.12, the likelihood that a defendant guilty of first degree murder, if spared, may pose a continuing threat to society is an aggravating circumstance. Thus, the prosecutor's comments about the possibility of future criminal acts by Davis pass constitutional muster. Likewise, the prosecutor's comments regarding the penological justifications for the death penalty, in this case the deterrence effect, are appropriate for closing argument and will not be disturbed. Id.

V.

Davis' fifth asserted error of constitutional proportion involves the allegedly incomplete instructions on mitigating circumstances. Davis argues

that his death sentence cannot stand because the jury failed to comprehend the nature and function of mitigating circumstances. Our review of jury instructions tendered in the sentencing phase of a capital trial centers on how a reasonable juror might construe the instructions. California v. Brown, 479 U.S. 538, 541 (1987). We will overturn the chosen sentence only if a "substantial possibility" exists that a reasonable juror construed the instructions in an improper manner. Mills v. Maryland, 108 S. Ct. 1860, 1867 (1988).

Instruction six in the sentencing phase of Davis' trial listed six factors which, if deemed to exist, could be considered in mitigation of punishment. The list, however, was not exhaustive as

the instruction further provided:

> You shall consider any or all of these minimum mitigating circumstances which you find apply to the facts and circumstances of this case. You are not limited in your consideration to these minimum mitigating circumstances. You may consider additional mitigating circumstances, if any, you find from the evidence in this case. What are and what are not additional mitigating circumstances is for you the jury to determine.

After informing the jurors that they would be authorized to consider the death penalty if they found beyond a reasonable doubt the existence of any of four enumerated aggravating circumstances, instruction five continued: "If you . . . find that such aggravating circumstance or circumstances is out weighed [sic] by the finding of one or more mitigating circumstances, the death penalty shall

not be imposed." Instruction twelve reiterated this balancing test. See 21 Okla. Stat. § 701.11 (unless at least one of the statutory aggravating circumstances is found or if any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed).

In Zant v. Stephens, 462 U.S. 862, 875 n.13 (1983), the Supreme Court stated that the Constitution does not require specific standards for balancing aggravating and mitigating circumstances. What the Constitution does require is a set of instructions which ensures that a reasonable juror will understand the meaning and function of mitigating circumstances: "[A] jury should be instructed that the law

recognizes circumstances which may considered as extenuating or otherwise reducing a defendant's culpability and hence his punishment." Andrews v. Shulsen, 802 F.2d 1256, 1264-65 (10th Cir. 1986), cert. denied, 108 S. Ct. 1091 (1988).

Although the trial judge in this instance did not tender an instruction which defined the term "mitigating circumstance," neither did the judge in Andrews, where we upheld similar sentencing instructions. Id. at 1265 ("trial judge recited the statutory mitigating circumstances, although he did not label them as such or explain their meaning and function"). Considering the instructions in their entirety, the jury in this instance, like its counterpart in Andrews, could

not have misunderstood the role of mitigating circumstances. The jurors were instructed that mitigating factors should be accounted for in reaching their decision, and that such factors should be balanced against any aggravating circumstances found to exist beyond a reasonable doubt in deciding between life and death. This is all the Constitution requires.

VI.

Davis' sixth contention focuses on that portion of sentencing instruction thirteen pertaining to sympathy: "You should not allow sympathy, sentiment or prejudice to affect you in reaching your decision. You should avoid any influence of passion, prejudice or any other arbitrary factor when imposing sentence." Davis claims the instruction

undermined the jury's consideration of the mitigating evidence he presented regarding his good character, see trial tr. at 837-72, in violation of the eighth amendment. Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) (en banc), governs our disposition of this issue.

In Parks, 860 F.2d at 1552-59, we held the following instruction tendered in the sentencing phase of a capital case unconstitutional: "You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence." Because this instruction may have led a reasonable juror to discount sympathy based on the mitigating evidence, it could not withstand a constitutional challenge: "[S]ympathy that is based on the evidence is a valid consideration in

sentencing that cannot constitutionally be precluded." Id. at 1553 (emphasis in original). But see California v. Brown, 479 U.S. 538, 542 (1987) (juror instructed to avoid influence of "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" would likely interpret it as an "admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence").

For purposes of eighth amendment analysis, this case is indistinguishable from Parks. Several of Davis' co-workers and acquaintances testified that he was a hard-working, considerate individual who didn't deserve to die. The instruction which directed the jury to remain unaffected by sympathy created a risk that the jury discounted Davis'

evidence in reaching its sentencing decision. Nor can we conclude that the instructions considered as a whole remedied this problem. Instruction thirteen is overbroad and requires us to set aside the death sentence.

VII.

Davis finally urges us to vacate his death sentence for the reason that it rests on an unconstitutionally vague and overbroad aggravating circumstance, namely that the murders were "especially heinous, atrocious, or cruel." The jury found three of the statutory aggravating circumstances enumerated in 21 Okla. Stat. § 701.12: (1) that the murder was especially heinous, atrocious or cruel; (2) the defendant was previously convicted of a felony involving the use or threat of violence to the person; and

(3) the defendant knowingly created a great risk of death to more than one person. Crim. App. Rec. at 75. Instruction eight defined the term "heinous" as "extremely wicked or shockingly evil," "atrocious" as "outrageously wicked and vile" and "cruel" as "designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others; pitiless."

We need look no further than Maynard v. Cartwright, 108 S. Ct. 1853 (1988), aff'g, 822 F.2d 1477 (10th Cir. 1987), to conclude that the instruction to which Davis objects was applied in an unconstitutional manner. In that case, the jury found that the defendant "knowingly created a risk of death to more than one person" and that the

murder was "especially heinous, atrocious, or cruel." The terms heinous, atrocious and cruel were defined by the exact language used in this case. We concluded these terms and their definitions failed to place "'any inherent restraint on the arbitrary and capricious infliction of the death sentence.'" Maynard, 822 F.2d at 1489-90 (quoting Godfrey v. Georgia, 446 U.S. 420, 428 (1980)). The Supreme Court agreed. Because the aggravating circumstance at issue did not sufficiently limit the sentencer's discretion, the risk of arbitrary and capricious action on the part of the jury could not withstand eighth amendment scrutiny. Thus, application of the aggravating circumstance fell for vagueness. Maynard, 108 S. Ct. 1856-57.

We are mindful that after Davis' conviction and sentence, the Oklahoma Court of Criminal Appeals in Stouffer v. State, 742 P.2d 562, 563-65 (Okla. Cr. 1987), cert. denied, 108 S. Ct. 763 (1988), restricted application of the "especially heinous, atrocious, or cruel" aggravating circumstance to murders involving torture or serious physical abuse. The court further subjected application of the unconstitutionally vague aggravating circumstance to harmless error analysis by removing it from sentencing consideration and reweighing mitigating circumstances against any remaining aggravating circumstances. See Wainwright v. Goode, 464 U.S. 78, 86-87 (1983). Shortly thereafter, the court in Castro v. State, 749 P.2d 1146,

1150-51, (Okla. Cr. 1987), cert. denied, 108 S. Ct. 1248 (1988), held that the application of Stouffer to defendants convicted prior to that decision did not violate the prohibition of ex post facto laws. Soon after Castro, however, the Court of Criminal Appeals in Dutton v. Dixon, 757 P.2d 376, 378-81 (1988), held that 21 Okla. Stat. § 701.13(E), which allows the court to remand for resentencing, was an ex post facto law because it permitted reinstitution of a death sentence--a result not possible under prior court decisions. The court in a terse statement found Castro inapplicable. Dutton, 757 P.2d at 382. What effect these Oklahoma decisions may have on this case in view of our disposition of Davis' final two points of error is for the state court to

address in the first instance.

VIII.

The order of the District Court for the Western District of Oklahoma is AFFIRMED with respect to the denial of the writ of habeas corpus, but REVERSED with respect to its denial of all further relief. The case is REMANDED to the district court with directions to enter judgment that the writ of habeas corpus is denied but, as law and justice require, the death sentence of petitioner is invalid under the eighth amendment to the United States Constitution. The execution of the petitioner under this invalid death sentence is enjoined. This judgment is without prejudice to further proceedings by the state for redetermination of the sentence on the conviction.

88-1878 (3)

Supreme Court, U.S.
FILED
MAY 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

JAMES SAFFLE, WARDEN,
OKLAHOMA STATE PENITENTIARY,
GARY MAYNARD, DIRECTOR
OKLAHOMA DEPARTMENT OF
CORRECTIONS,
ROBERT H. HENRY,
ATTORNEY GENERAL OF
OKLAHOMA,

Petitioners,

vs.

CHARLES WILLIAM DAVIS,
Respondent.

APPENDIX B TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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ATTORNEYS FOR PETITIONERS
May, 1989
*Counsel of Record

8/11 PP

IN THE UNITED STATES COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

CHARLES WILLIAM DAVIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. CIV-86-1202-W
	)	
GARY MAYNARD, WARDEN, OKLAHOMA STATE PENITENTIARY, and ROBERT H. HENRY, Attorney General of Oklahoma,	)	
	)	
Respondents.	)	

ORDER

This matter comes before the Court on the Petition for Writ of Habeas Corpus of the petitioner, Charles William Davis, filed pursuant to title 28, section 2254 of the United States Code and on the petitioner's Motion for

Evidentiary Hearing. The respondents, Gary Maynard, Warden, Oklahoma State Penitentiary, and Robert H. Henry, Attorney General of Oklahoma, have submitted argument and authority in opposition to both the petition and the motion and based upon the parties' submissions and as set forth herein, the Court finds that the petitioner is not entitled either to an evidentiary hearing or to the relief requested in his petition.

Petitioner Davis was charged by information filed on August 15, 1977, with two counts of murder in the first degree in the deaths of Robert Wayne Jones and Dennis Lee McLaughlin. In February 1978 he was tried by The Honorable David M. Cook, District Judge of Oklahoma County, Oklahoma, and was

convicted by a jury on both counts. State v. Davis, Nos. CRF-77-2905, CRF-77-2906. The jury recommended a sentence of death on each count on February 28, 1978, and the judgments and sentences of death imposed by the trial court on March 16, 1978, were appealed to the Oklahoma Court of Appeals on September 18, 1978.

The state court denied the appeal on May 9, 1983, and affirmed the petitioner's convictions. Davis v. State, 665 P.2d 1186 (Okla. Crim. 1983). On June 20, 1983, the state court denied the petitioner's request for rehearing and a Petition for Writ of Certiorari was thereafter lodged with the United States Supreme Court. The Supreme Court denied the writ on October 3, 1983. Davis v. Oklahoma, No. 83-5183

(October 3, 1983).

Petitioner Davis also made application on March 7, 1984, for post-conviction relief to the District Court of Oklahoma County, Oklahoma. The application was denied by The Honorable William R. Saied, District Judge for Oklahoma County, Oklahoma, on December 28, 1984, and an appeal from this decision was taken to the Oklahoma Court of Criminal Appeals on January 25, 1985. This appeal was denied on March 21, 1985. Davis v. State No. PC-85-55 (March 21, 1985). Petitioner Davis thereafter filed a second Petition for Writ of Certiorari with the United States Supreme Court and it likewise was denied. Davis v. Oklahoma, No. 84-6778 (March 31, 1986).

In the instant Petition for Writ of

Habeas Corpus, the petitioner has raised the following grounds as error warranting relief:

(1) the jury was precluded from considering mitigating evidence pertaining to sympathy in violation of the eighth and fourteenth amendments;

(2) the state's failure to provide funds for psychiatric assistance violated the petitioner's sixth amendment right to effective assistance of counsel, his eighth amendment right to individualized sentencing and his fourteenth amendment rights to due process and equal protection of the laws;

(3) jurors Helen Metivier and Christine Musgrave were excused in violation of the petitioner's eighth and fourteenth amendments rights;

(4) the prosecutor made improper comments in the closing argument of the second stage;

(5) the application of one aggravating circumstance to this case violated the petitioner's fourteenth amendment right to due process and the eighth amendment's prohibition against cruel and unusual punishment;

(6) the jury instructions in the sentencing phase unconstitutionally shifted the burden of proof to the petitioner;

(7) the jury instructions in the sentencing phase were confusing and ambiguous and failed to explain the jury's duty to weigh mitigating and aggravating circumstances and failed to inform the jury of its right to recommend a sentence to life;

(8) the jury's instructions as a whole unconstitutionally shifted the burden of proof to the petitioner;

(9) the application of the death penalty to this petitioner is erroneous and arbitrary; and

(10) jurors Samuel Hearst, Modena Dragus and Betty Ann Rockel were excused improperly for cause.

The parties have agreed that the foregoing grounds have been exhausted by the petitioner in the state courts and for that reason, this Court has jurisdiction over this petition. Rose v. Lundy, 455 U.S. 509 (1982). In reviewing the grounds advanced by the petitioner and in particular those grounds regarding the state's failure to appoint a psychiatrist, the application of one aggravating circumstance in this

case and the application of the death penalty to this petitioner, the Court finds such grounds to not warrant review by evidentiary hearing. The burden is on the petitioner to demonstrate the necessity for such a hearing and if the merit of the petitioner's claims can be determined from the record, a hearing is not required. E.g., Townsend v. Sain, 372 U.S. 293 (1963); Coleman v. Brown, 802 F.2d 1227 (10th Cir. 1986).

In the instant case the parties have submitted the transcripts of the trial and of the pretrial motions and have submitted the record from the Oklahoma Court of Criminal Appeals. The Court finds this to be sufficient from which to evaluate the merits of all of the petitioner's claims for relief without

augmentation through an evidentiary hearing.

The Court finds further in discussing these claims for relief that it is unnecessary to recite in detail the events giving rise to the petitioner's convictions except to state that the victims, Dennis McLaughlin and Robert Wayne Jones, were killed on August 13, 1977, by the petitioner at his apartment; that Mr. Jones, the brother of the petitioner's wife, Kathy Jones Rogers (Davis), and Mr. McLaughlin had been helping Mrs. Rogers remove her possessions from the apartment; and that the petitioner severely wounded Mrs. Rogers and a second brother, Henry Jones, at the same time.

The jury found as evidenced by the verdict forms, see Original Record at

75, 144 [hereinafter cited as Or.], that the murders were especially heinous, atrocious or cruel, that the petitioner knowingly created a great risk of death to more than one person and that the defendant had been previously convicted of a felony involving the use or threat of violence. The jury found further that these aggravating circumstances outweighed any and all mitigating circumstances and based on the same, fixed the petitioner's penalty at death by lethal injection.

The first ground advanced by the petitioner is that the eighth and fourteenth amendments to the United States Constitution were violated because the jury was instructed to disregard certain evidence introduced by the petitioner during the sentencing

stage. Such evidence included a tape-recorded statement by the petitioner of his feelings for his wife, the testimony of various witnesses who had observed first-hand the petitioner's love for his wife, the testimony of the petitioner's probation officer and the testimony of the petitioner himself. The petitioner has argued that Instruction 13 submitted by the trial court to the jury diverted the jury from its duty to consider any sympathetic aspects of the defendant's character and thus rendered meaningless the petitioner's constitutional right to introduce this evidence in mitigation of punishment. E.g., Skipper v. South Carolina, 54 U.S.L.W. 4403, 4404 (April 29, 1986)(quoting Eddings v. Oklahoma, 455 U.S. 108, 110 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 604

(1978) (accused must be allowed to present in mitigation of punishment "'"any aspect of [his] character or record and any of the circumstances of the offense . . . ."'")). The respondents have argued that sympathy for any party is not based upon evidence in the record and is therefore irrelevant to the factfinding and weighing functions with which the jury in a capital case is charged.

The jury in the instant case was instructed in the second stage in Instruction No. 6 that it should consider those enumerated mitigating circumstances as well as any and all additional mitigating circumstances it found "from the evidence in this case." Or. 63, 133. The jurors were then instructed in Instruction No. 13 that

they were the "judges of the facts" and that "[t]he importance and worth of the evidence [was] for [them] to decide," Or. 70, 140. They were further instructed that they "should not allow sympathy, sentiment or prejudice to affect [them] in reaching [their] decision" and that they "should avoid any influence of passion, prejudice or any othcr arbitrary factor when imposing sentence." Or. 70, 140.

The Court finds such instruction does not preclude consideration of any evidence regarding any aspect of the petitioner's character or record or any of the circumstances of the crimes offered by the petitioner as a basis for a sentence less than death. Such instruction does not advise the jury to avoid its dutv to consider mitigation

evidence; it instead guards against consideration by the jury of arbitrary and emotional factors not supported by the evidence and not based on the petitioner's character or record or the offense itself.

In rejecting a similar argument based upon an instruction which cautioned the jury that it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," the United States Supreme Court has stated that:

> [a]n instruction prohibiting juries from basing their sentencing decisions on factors not presented at the] trial, and irrelevant to the issues at the trial, does not violate the United States Constitution. It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think would be far more likely to turn the jury against a capital defendant than

> for him. And to the extent that the instruction helps to limit the jury's consideration to matters introduced in evidence before it, it fosters the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case."

California v. Brown, 55 U.S.L.W. 4155, 4157 (January 27, 1987) (quoting Woodson v. North Carolina, 438 U.S. 280, 305 (1976)).

The Court finds based upon the foregoing authority that Instruction No. 13 does not prevent the jury from consideration of compassionate evidence but only consideration of "emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase," Brown, 55 U.S.L.W. at 4156, and is therefore not constitutionally infirm.

The second ground raised by the

petitioner is that his sixth amendment right to effective assistance of counsel, his eighth amendment right to individualized sentencing and his fourteenth amendment rights to due process and equal protection of the law were violated by the state's failure to provide funds for psychiatric assistance.

The request for funds was first raised before The Honorable Stewart Hunter on the Friday before trial was to commence on Monday, February 21, 1978. The hearing before Judge Hunter was not electronically recorded and the only evidence of what occurred is reflected by the testimony given at the pretrial hearing held on Monday before the trial judge, Judge Cook. A transcript of this pretrial hearing reveals that the issue

was raised by defense counsel as one of five grounds for a continuance as follows:

> We would also ask for additional time to secure educational and psychological testing. In light of the prior mental examination that was ordered in 1942, we feel that is evidence. From talking with the Defendant we feel that educational and psychological testing is material and necessary for proper presentation of the Defense.
>
> We would add that this particular motion indicative and supported in spirit if not the letter of Judge Stewart Hunter's ruling on Friday of last week regarding educational and psychological testing should be ordered at state the Defendant if it could be done on returned prior to Tuesday. We did make an effort to have that done. It was not successful. We feel, though that this is necessary to proper presentation of the Defense in this case.

Motion Hearing, Transcript at 6 (February 21, 1978) [hereinafter H.Tr.].

In response, one of the two prosecutors

made the following statements:

> The motion that the Defense presented on Friday before Judge Hunter did not raise any question of this Defendant's sanity. The Defense asked that the Court order the providing of State funds to use in hiring expert witnesses to test this man, to test his IQ and provide psychological testing.

H.Tr. 9. Judge Hunter at the request of Judge Cook appeared at tne pretrial hearing and upon inquiry by Judge Cook, made the following statements:

> As I recall, it was a motion for funds to hire an expert witness to testify in mitigation. The gist of it being that he wanted to get a psychiatrist or psychologist to examine the Defendant and then testify in mitigation presuming the trial reached that point.
>
> My feeling was that if Defendant had sufficient funds of his own and was incarcerated, I would order him to be made available for an examination by his own private psychiatrist. I felt that an indigent should be entitled to the same thing if it is available. And my intent was to order him to be made available for an examination by a State

> psvchiatrist because there are no state funds available to my knowledge for expert witnesses in either event. My thinking was that it's not one of those things that is necessarily necessary, but it would sure be nice to have if you were a Defendant in a first degree murder case.

H.Tr. 24. Judge Cook then inquired of Judge Hunter whether he was "of the judicial opinion or not that such examination would be necessary to insure the Defendant a fair trial," H.Tr. 24, and such questioning prompted the following dialogue between Judges Hunter and Cook.

Judge Hunter: No. No, I think it is one of those things a good defense attorney would try to keep in his back pocket in case he needed it.

Judge Cook: I take it what you mean to say is that you would order him made available to whatever expert persons, expert witnesses, that the

Defendant may choose because he is in custody, is that it? As an accommodation?

Judge Hunter: Right. It was an accommodation, and I felt if the State would do it that the Defendant should be made available for the examination. And I would think that if a private physician were available, the Defendant should be made available. But I specifically ordered that it had to be done if it could be done prior to trial today without any prejudice to the trial date.

Judge Cook: But you made no judicial determination at that time concerning the matter of whether it was necessary to insure a fair trial?

Judge Hunter: No.

H.Tr. 25. At the conclusion of these statements, Judge Cook denied the petitioner's request for a continuance.

H.Tr. 25.

On direct appeal, the petitioner argued only that the state's failure had denied him the right to present mitigation evidence and had therefore deprived him of due process and equal protection of the law. The appellate court, which issued its first decision prior to Ake v. Oklahoma, 470 U.S. 68 (1985), stated that an accused had no right to state funds to hire a psychiatrist to present such evidence. 665 P.2d at 1190.

In its Order affirming the denial of petitioner's Application for Post-Conviction Relief, which was issued after the United States Supreme Court's decision in Ake, the state appellate court found that the facts of the instant case were clearly

distinguishable from the claims presented in Ake since the petitioner's sanity was never at issue in the second stages since the petitioner never displayed any mental disorders at trial and since the record reflected that the petitioner's defense to these crimes was self-defense. Order Affirming Denial of Post-Conviction Relief, Case No. PC-85-55 (Okla. Crim. March 21, 1985) at 2-3. The appellate court found further that the state offered no psychiatric or psychological evidence during the second state proceedings and thus the petitioner had suffered no prejudice. Id. at 3.

In Ake, the United States Supreme Court considered the issue of whether the federal constitution requires that an indigent defendant have access to

psychiatric assistance to enable defense counsel to prepare an effective defense based on mental condition, when sanity at the time of the offense is seriously in question. The Supreme Court held that "when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." 470 U.S. at 76, and "that when a defendant has made a preliminary showing that his sanitv at the time of the offense likely to be significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one." Id. at 74.

The instant petitioner has contended

that psychological evaluation at state expense was necessary so evidence could have been presented during the first stage to aid defense counsel in determining whether the petitioner had a valid insanity defense and during the second stage in mitigation of punishment.

The record clearly demonstrates however that the petitioner did not make a preliminary showing that sanity at the time of the offenses was likely to be a significant factor at trial. The requested assistance was for purposes of mitigation and not to aid defense counsel in determining whether the petitioner had a valid insanity defense. Trial Transcript at 673-74 [hereinafter cited Tr.). The record demonstrates that the sole defense offered by the

petitioner was self-defense and thus, the petitioner has failed to establish that the state's failure to provide such assistance for use during the first stage warrants the petitioner's requested relief.

The second prong of the petitioner's argument is that such examination and evaluation were likewise critical in aiding defense counsel in presentation of evidence during the second stage in mitigation of punishment and in insuring that sentencing this petitioner to death by lethal injection was the appropriate punishment in this case.

As stated, the Court is aware that an accused should be afforded in the penalty phase the opportunity to present any and all relevant mitigating evidence regarding his character or record and

regarding the circumstances of the offense, Eddings, 455 U.S. at 110, and that "[c]onsideration of such evidence is a 'constitutionally indispensable part of the process of inflicting the penalty of death.'" 55 U.S.L.W. at 4156 (quoting Woodson, 428 U.S. at 304 (opinion of Stewart, Powell and Stevens, JJ.)). Such evidence can include testimony to rebut the petitioner's potential for future dangerousness as well as testimony to establish his mental or emotional state at the time the offenses were committed. Indeed the instant jury was instructed to consider as a specific mitigating circumstance whether the murders were committed while the petitioner "was under the influence of extreme mental or emotional disturbance," Or. 63, 133, and as a

specific aggravating circumstance whether it was probable that the petitioner "would commit criminal acts of violence that would constitute a continuing threat to society." Or. 61, 131.

In Ake, the Supreme Court recognized that in the penalty phase psychiatric testimony and assistance might likewise prove valuable and stated that "[t]he variable upon which [the Court] must focus is . . . the probable value that the assistance of a psychiatrist will. have in this area, and the risk attendant on its absence." 470 U.S. at 84. The Supreme Court reaffirmed that in those instances where the state has placed before the jury psychiatric testimony on the question of future dangerousness, the jury should likewise

be exposed to the opposing views of the accused's id., and in Ake, potential for future dangerousness was a significant factor at the sentencing stage as evidenced by the state's psychiatrist who testified that the defendant posed a threat of continuing criminal violence. Id. at 86. The Supreme Court however did not address those instances where future dangerousness was not a significant factor in the penalty stage and where the state did not present expert witnesses on the issue as here and thus this Court is left ro employ the foregoing test articulated bv the Supreme Court under the facts of this case.

In the instant case the petitioner was afforded the opportunity during the second stage to present evidence in

mitigation of punishment and to explore before the jury the petitioner's character and feelings for his wife as well as his emotional state, through lay witnesses, resulting from his wife's departure. While the petitioner has stated that he "never had an opportunity to see any type of psychiatrist despite factor about the individual that could clearly make one conclude that a doctor would have established critical mitigating evidence to save petitioner's life," Petitioner's Brief at 12 (emphasis added), and described different types of mitigating circumstances, id. at n.2, the petitioner has failed to explain or clarify the nature of this alleged ''factor." Undeveloped assertions that the requested assistance would have been

beneficial cannot operate to trigger the process whereby the state is obligated to prove such assistance and do not warrant a finding by this Court at this stage that the sixth amendment right to effective assistance of counsel, his eighth amendment right to individualized sentencing and his fourteenth amendment rights to due process and equal protection have been violated.

The third and tenth grounds advanced by the petitioner are that his sixth and fourteenth amendment rights were violated when jurors Helen Metivier, Christine Musgrave, Samuel Hearst, Modena Dragus and Betty Ann Rockel were excused for cause, over the objection of defense counsel, as a result of their responses to the trial judge's questions regarding the death penalty. The

petitioner has contended that the exclusion of these prospective jurors was prompted by the trial judge's use of a constitutionally incorrect standard and not by any ambiguities or indecisiveness in their answers.

The matter was raised on direct appeal and the Oklahoma Court of Criminal Appeals found that each of the challenged jurors had been properly excluded. 665 P.2d at 1194; see Order Affirming Denial of Post-Conviction Relief, Case No. PC-85-55 (Okla. Crim. March 21, 1985).

Judge Cook's initial question to each juror was:

> [I]n a case where the law and evidence warrant, in a proper case, could you, without violence to your conscience agree to a verdict imposing the death penalty?

Tr. 13. If a prospective juror

responded with less than a clear, affirmative answer, Judge Cook continued with the examination of. that particular veniremember. Juror Metivier answered Judge Cook's first question by stating: "I have problems with that, Tr. 289, and such response initiated the following exchange:

Judge Cook: You have problems with the Death Penalty? And I ask you a second question: If you found beyond a reasonable doubt that the Defendant was guilty of Murder in the First Degree,. and if under the evidence and the facts and the circumstances of the case, the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case, you would not inflict the Death Penalty?

Ms. Metivier: No.

Judge Cook: You would not inflict the Death Penalty inspite of the evidence, the law and the circumstances of the case? Do I understand you?

Ms. Metivier: Right.

Tr. 289. Defense counsel was then permitted to voir dire Ms. Metivier and the following ensued:

Defense counsel: Ms. Metivier, my question, and I am asking you, do I hear you right? Are you saying that you could never impose the Death Penalty in any case? You are not saying that under a proper case, that you couldn't consider imposing the Death Penalty?

Prosecutor: I object to the form of the question, Your Honor.

Judge Cook: The form of the question is improper. It is sustained.

Defense counsel: Ms. Metivier, you are not saying you could automatically refuse to impose the Death Penalty in any case, are you?

Ms. Metivier: No, I'm not.

Tr. 291. Whereupon trial judge asked the following question and received the following response:

Judge Cook: I ask you again: If you found beyond a reasonable doubt that this Defendant was guilty of Murder in the First Degree, and if under the evidence and facts and circumstances of this case, the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case, you would not inflict the Death Penalty?

The reason I repeat the question is

because you answered that you would not u n d e r a n y circumstances inflict the Death Penalty when I first .asked the question. How do you answer the question now?

Ms. Metivier: I just don't believe in taking one's life.I'm not--You know,--.

Tr. 291. Ms. Metivier was then excused for cause by Judge Cook. Tr. 292.

Juror Musgrave in response to Judge Cook's initial question stated: "I believe I could." Tr. 220. Judge Cook informed the prospective juror that such response was not sufficient and began the following voir dire of Ms. Musgrave by stating:

> I take that as being an answer tantamount to saying that you don't know. I will ask it again.
>
> In a case where the law and the evidence warrant, that is a proper case, could you, without doing

violence to your conscience, agree to a verdict imposing the Death Penalty?

Ms. Musgrave: I don't believe I could. Judge Cook: You don't believe you could? If you found beyond a doubt that the Defendant in this case was guilty of Murder in the First Degree and if under the evidence, facts and circumstances of the case the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case you would not inflict the Death Penalty?

Ms. Musgrave: No.

Judge Cook: Ma'am?

Ms. Musgrave: No. I don't think I would. Judge Cook: You would not?

Ms. Musgrave: Huh-uh.

Judge Cook: Is that a positive answer? Ms. Musgrave:

Yes, sir.

Judge Cook: Or not?

Ms. Musgrave: Yes, sir.

Tr. 220-21. Defense counsel was likewise permitted to question Ms. Musgrave.

Defense Counsel: Miss Musgrave, I believe I heard you say to that final question that: you don't think you would. Now, that--Do I hear that to mean that you could possibly impose the Death Penalty in some particular case?

Ms. Musgrave: Yes. That is right.

Tr. 221-22. Judge Cook then repeated his cuestion and Ms. Musgrave gave the following response:

Judge Cook: Well, I ask again. In this case if the law and the evidence warrant, in a proper case, if this a proper case, could you without doing violence to your conscience, agree to a verdict

> imposing the Death Penalty? I cannot accept anything short of a positive to that question, Miss Musgrave. Yes or no?

Ms. Musgrave: No. I would say no.

Tr. 222. This prospective juror was then excused by Judge Cook for cause. Tr. 223.

Juror Dragus, the third of the five prospective jurors challenged by the petitioner as being improperly excused, was questioned by Judge Cook in the following manner:

Judge Cook: In a case where the law and the evidence warrant, in a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death Penalty?

Ms. Dragus: I couldn't do it without thinking about it. I didn't even sleep last night. I prayed all night about

it. I don't think I could do it without it bothering me.

Judge Cook: If you found--As a Juror, if you found beyond a reasonable doubt that this Defendant was guilty of Murder in the First Degree, and if under the evidence and facts and circumstances of the case the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case, you would not inflict the Death Penalty?

Ms. Dragus: I don't think I would.

Judge Cook: I must have a rather positive answer.

Ms. Dragus: I couldn't do it without it bothering me.

Judge Cook: Well, I submit, Mrs. Dragus, that judgments that all of us render, we reflect on, and as I use your words, it

bothers us. This is human nature. The Court requires a positive answer. If you are unable one, I will accept that. And - accept it as a statement by you that you don't know.

I ask the question again: If you found beyond a reasonable doubt that the Defendant in this case was guilty of Murder in the First Degree, and if under the evidence, facts and circumstances of the case the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, regardless of the facts and circumstances of the case, you would not inflict Death Penalty?

Mrs. Dragus: No, I wouldn't.

Tr. 224-25. Again defense counsel was permitted to participate in voir dire

which prompted the following objection by the prosecutor and comment bv Judge Cook.

Defense counsel: Mrs. Dragus, I believe the first time he asked you that question you said you didn't believe you could. Now, are you saying to the Court that you wouldn't impose the Death Penalty in any First Degree Murder case? Or would you just simply consider what case would be proper to impose it in?

Prosecutor: I object to the form of the question, Your Honor.

Judge Cook Yes. The form of the question is confusing. I think I have asked the question about as positive as it can be put. And the prospective Juror has answered very positively. Anything further?

Tr. 225-26. After objection by defense counsel, this juror was excused for cause. Tr. 226.

Betty Ann Rockel is the penultimate juror whose exclusion by the trial court has been advanced by the petitioner as grounds for relief. In response to Judge Cook's first question, Juror Rockel stated:

> I have been debating this in my mind. And I don't know how to answer you. I could agree on whether or not I thought the person was guilty. I do not know if I could impose the Death Penalty until it got to that point.

Tr. 227. The trial judge then asked his second question and the following exchange occurred:

Judge Cook: If you found beyond a reasonable doubt that the Defendant in this case was guilty of Murder in the First Degree, and if under the evidence, facts

and circumstances of this case, the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and circumstances of the case, you would not inflict the Death Penalty?

Ms. Rockel: Again, I would have to say that if I thought in my mind it was a particularly heinous crime or something, and it was deserving of the Death Penalty, I think I could at that time. But I cannot positively answer you.

Judge Cook: It would depend on the law and the evidence?

Ms. Rockel: Yes.

Judge Cook: If the law and the evidence justified it under the questions I have previously asked you, and considering those questions, could you inflict the Death Penalty?

Ms. Rockel: I honestly do not know if I could or not.

Tr. 227-28. Judge Cook then determined over objection of defense counsel that Ms. Rockel should be removed for cause. Tr. 229.

The final juror whose exclusion is challenged by the petitioner is Samuel Hearst. The following is an excerpt of the voir dire of this veniremember.

Judge Cook: [I]n a case where the law and the evidence warrant, that is in a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death Penalty?

Mr. Hearst: I believe I could.

Judge Cook: You believe you could?

Mr. Hearst: Yes.

Judge Cook: Can you answer that more specifically?

Mr. Hearst: Well--

Judge Cook: I will ask it again. In a case where the law and the evidence warrant, that is in a proper case, could you without doing violence to your conscience, agree to a verdict imposing the Death Penalty?

Mr. Hearst: I'd still like to say that I believe I could.

Judge Cook: You believe you could? Well, in other words, I take it you mean to say that if the evidence warranted it under the law, you could do that then; is that correct?

The parties are entitled to something a little more specific.

. . . .

Judge Cook: I put the question again to Mr. Hearst. In a case where the law and the evidence warrant, that is in a proper case, could you, without doing violence to your conscience, agree to

a verdict imposing the Death Penalty?

Mr. Hearst: I think I better excuse myself.

Judge Cook: How do you answer the question? Yes or no?

Mr. Hearst: I'd have to say the same thing I said three times. I believe I could. I don't know how else to--

Judge Cook: Well, I take that to mean you don't know? At this time?

Mr. Hearst: That's right.

Judge Cook: I don't believe I can put the question any more specifically, Mr. Hearst, than I have. The Court feels that the party litigants in this case are entitled to a more definitive answer from each of you.

Tr. 138-41. Defense counsel was then permitted to participate in the voir dire.

Defense counsel: Mr. Hearst, you have heard the questions of

the Court concerning the Death Penalty. First may I ask you this: Would your scruples or. beliefs regarding the Death Penalty have any determination or affect upon you deciding the guilt or innocence of Charles Davis? If it was a two-stage proceeding and you decided guilt or innocence first and penalty second?

Mr. Hearst: I don't know how to answer that. I really don't.

Defense counsel: If you were only determining the guilt or innocence of Charles Davis in the first stage, would your consideration of the--would any scruples that you have or beliefs that you have about the Death Penalty affect your determination of guilt or innocence?

Mr. Hearst: Well, I'm really afraid I wouldn't be-

. . . .

Mr. Hearst: I wouldn't be able to inflict the Death Penalty.

. . . .

Defense counsel: Mr. Hearst, are you telling the Court that you would to impose the Death Penalty in any case? You could impose it-- Could you impose it in a case if the facts and circumstances warranted it? Could you consider it?

Prosecutor: Your Honor, I object to the form of the question.

Judge Cook: Yes. I will put the final question to the Juror. If you found beyond a reasonable doubt, Mr. Hearst, that this defendant was guilty of Murder in the First Degree, and if under the evidence, facts and circumstances of the case the law would permit you to consider a sentence of death, are your reservations about the Death Penaltv such that

regardless of the law, the facts and the circumstances of this case, you would not inflict the Death Penalty?

Mr. Hearst: I'm afraid that is true.

Tr. 142-44. Juror Hearst was then excused by Judge Cook for cause. Tr. 144.

In Wainwright v. Witt, 469 U.S. 412 (1985), the United States Supreme Court took the opportunity to clarify its decision in Witherspoon v. Illinois, 391 U.S. 510 (1968), and to reaffirm the standard enunciated in Adams v. Texas, 448 U.S. 38 (1980), as the proper standard for determining whether a prospective juror may be excluded for cause because of his or her views on capital punishment. The Supreme Court stated that the standard to be employed

"is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" 469 U.S. at 424 (quoting Adams, 448 U.S. at 45); e.g., Darden v. Wainwright, 54 U.S.L.W. 4734 (June 23, 1986). The Supreme Court noted that this standard

> does not require a juror's bias to be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear;" these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge

> is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

469 U.S. at 424-26. The Supreme Court then stated that for these reasons, "deference must be paid to the trial judge who sees and hears the juror." Id. at 426.

The instant case, as did Witt, arises under title 28, section 2254 of the United States Code and thus, this Court is required to accord any findings of the state court on factual issues a presumption of correctness. 28 U.S.C. § 2254(d). The Supreme Court held in Witt that the determination of whether a veniremember is biased and requires exclusion is one such factual issue entitled to this presumption, 469 U.S. at 429 (predominant function in

determining juror bias involves credibility findings basis of which cannot be easily discerned from appellate record), unless one of the enumerated reasons for avoiding the presumption is present. 28 U.S.C. § 2254(d)(1)-(8).

Section 2254(d)(8) provides that a factual uetermination that is not fairly supported by the record does not qualify for this of correctness and this exception upon which the instant petitioner has relied in arguing that Judge Cook did not employ the correct standard in questioning potential jurors and in asserting that the voir dire conducted by Judge Cook was thus improper and confusing and does not support his decisions to excuse these five veniremembers.

As the Supreme Court noted "[r]evelant voir dire questions addressed to this issue need not be framed exclusively in the language of the controlling opinion." 469 U.S. at 433-34. This Court must only determine whether Judge Cook's decision that each of these five jurors' view would "prevent or substantially impair the performance of his [or her] duties as a juror," 448 U.S. at 45, is fairly supported by the record. The Court has examined each exchange and while the precise wording of such questions and the responses to each (save perhaps these responses of jurors Dragus and Hearst) do not by themselves compel the conclusion that these jurors could not under any circumstances impose the death penalty, Judge Cook was aided in his

assessment of each juror's bias not only by evaluating his or her responses but also by observing his or her demeanor and manner in responding.

Jurors Metivier and Musgrave gave confusing and conflicting answers and juror Rockel was unable to answer positively that she could impose the. death penalty under appropriate and proper circumstances. Juror Dragus while hesitant at first stated positively that she would not inflict the death penalty and juror. Hearst was equally equivocal in his beliefs before determining that he would not be able to inflict the death penalty.

This Court finds under the applicable caselaw and upon viewing the voir dire of each challenged juror as a whole, that Judge Cook's decision to exclude

each of these jurors was made after interrogation under the proper standard and that such decision is in each instance fairly supported by the record. Accordingly, grounds three and ten as advanced by the petitioner do not support his request for relief. See also Lockhart v. McCree, 54 U.S.L.W. 4449 (May 5, 1986).

The next ground advanced by the petitioner is that the remarks of one prosecutor during closing argument of the penalty phase of the trial violated his fourteenth amendment right to due process and his eighth amendment right to reliability in the sentencing process, The following statements form the basis of this contention.

> [W]e are losing the ability to become angry. Doesn't it sometimes--Don't you sometimes feel that sometimes we have got to

stand up and say no more? You know? No more.

. . . .

That that has got to stop? And you cannor commit crimes of this kind with impunity. And a life sentence for this man isn't punitive. .We tried that already. And it didn't work. . . .

I suppose you don't do it, and you pick up the morning paper in a month or a week or five years, and he has killed somebody else. How do you live with that? How do you say to yourself: You know, if I had had the courage to do what was right and what the evidence compels and what the law requires, if I had had the courage to do it then, it wouldn't have happened.

No there the distinct that by, coming saying no more, that you might deter others from this act-
-

. . . .

Suppose that you know by your judgment here and bv having the courage to stand up and say it, suppose you just deter one. person from committing this crime. Cause one person to think just a minute before they do it. Before they pull the trigger, and they won't, and the score is even.

Tr. 906-07. Defense counsel objected to the statement and moved for a mistrial. Tr. 907. The trial court denied the objections, Tr. 907, and permitted the prosecutor to continue.

On direct appeal the Court of Criminal Appeals found that the evidence had show: that the petitioner had been previously convicted of murder, that he did return from prison to kill again, not once, but twice, and that he had caused serious bodily injury to two others. 665 P.2d at 1201. The state appellate court rejected the contention that the remarks were an improper and unmistakable reference to the pardon and parole system and found that the remarks not only were derived from direct evidence presented during both stages of the trial but also fell within the

bounds of permissible closing argument. Id. The state court also found that any alleged error was waived by defense counsel's failure to request that the jury be admonished to disregard the statements since under Oklahoma law, timely objections alone do not properly preserve alleged error for appellatc review. Id.

The petitioner before this Court has claimed that these remarks unduly and improperly emphasized the deterrent effect of capital punishment and advised the jurors that they need not make the decision that the appropriate for this specific individual. In reviewing whether these statements warrant modification of the petitioner's sentence, it is not enough that the Court find that such statements are

undesirable or even universally condemned. E.g. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)(citing Cupp v. Naughten, 414 U.S. 141, 146 (1973)); see Darden, 54 U.S.L.W. at 4737-38 (comments during closing arguments in guilt-innocence state). The Court must find that the prosecutor's comments rendered the petitioner's trial so fundamentally unfair as to deny him due process or affected the sentencing decision of the jury to the extent that imposition of the sentence would be arbitrary and capricious.

As the United States Court of Appeals for the Tenth Circuit stated in Coleman v. Brown, 802 F.2d 1227 (10th Cir. 1986), because

> [d]eath is qualitatively different from all other punishments, . . .

> "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." A decision on the propriety of a closing argument must look to the Eighth Amendment's command that a death sentence be based on a complete assessment of the defendant's individual circumstances and the Fourteenth Amendment's guarantee that no one be deprived of life without due process of law.

Id. at 1238-39 (quoting Woodson, 429 U.S. at 305)(other citations omitted). The Tenth Circuit in addressing those subjects a prosecutor may broach during closing argument found permissible comments on a defendant's future dangerousness and chances for. rehabilitation as well as comments "concerning the penological justification for the death penalty, i.e., retribution, incapacitation, and general deterrence." 802 F.2d at 1239.

The instant remarks fall within the foregoing categories and such statements did not so infect the sentencing stage with unfairness as to make the resulting sentences of death a denial of due process. Likewise such statements did not render the sentencing state so unreliable that the sentences imposed by the jury resulted from emotional reaction and not from consideration of the evidence and circumstances in this specific case.

The fifth ground asserted by the petitioner in his Petition for Writ of Habeas Corpus is that the application of one of the enumerated aggravating circumstances in this instance violated his eighth and fourteenth amendment rights. The jury found that the murders committed by the petitioner were

especially heinous, atrocious or cruel, Or. 44, 175, and the petitioner has contended that the affirmance of such findings by the Oklahoma Court of Criminal Appeals in this case does not comply with the plurality holding of the United States Supreme Court in Godfrey v. Georgia, 446 U.S. 420 (1980).

In Godfrey, the Supreme Court had under consideration the Georgia Supreme Court's interpretation and application of the statutory aggravating circumstance that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code § 27-2534.1(b)(7) (1978). The Georgia Supreme Court in earlier cases had set forth three criteria for finding that a

case involved this particular aggravating circumstance.

In Godfrey however the state supreme court affirmed without explanation the jury's finding of this particular circumstance even though the case did not meet any of the criteria previously established. It was this unexplained departure from the narrow construction of the circumstance from which the United States Supreme Court determined that the imposition of the death penalty in Godfrey was the result of caprice or emotion and required reversal. 446 U.S. at 432-33.

In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court held that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the

punishment will be inflicted in an arbitrary and capricious manner. In Gregg v. Georgia, 428 U.S. 153 (1976), the Supreme Court reaffirmed this holding and stated:

> [Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Id. at 189 (opinion of Stewart, Powell and Stevens, JJ.).

> A capital sentencing scheme must, in short, provide a "'meaningful basis for distinguishing the few cases in which [the penalty is imposed from the many cases in which it is not." Gregg, 428 U.S. at 188 (quoting Furman, 408 U.S. at 313). That means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the

> crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." 428 U.S. at 196 n.47. See also Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v.Texas 428 U.S. 262 (1976). It must channel the sentencer's discretion by "clear and objective standards," Gregg, 428 U.S. at 198, that provide "specific and detailed guidance," Proffitt, 428 U.S. 253, and that "make rationally reviewable the process for imposing a sentence of death. "Woodson, 428 U.S. at 303.

446 U.S. at 427-28.

The Supreme Court in determining whether in the offense in Godfrey was "outrageously or wantonly vile, horrible and inhuman," recognized that such standard was constitutional on its face, but that there was

> nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or

> wantonly vile, horrible and inhuman."

446 U.S. at 428-29. It was the Georgia Supreme Court's departure from its obligation to keep this aggravating circumstance within constitutional bounds and to restrict approval of the death penalty to those cases that lie at the core of such circumstance that prompted the United States Supreme Court to take action. See Harris v. State, 237 Ga. 718, 733, 230 S.E.2d 1, 11 (1976).

This Court must examine the application of the particular aggravating circumstance challenged by the instant petitioner and determine whether the Oklahoma Court of Criminal Appeals in affirming the jury's finding of such circumstance as to each victim

likewise departed from its obligation to keep such circumstance within constitutional bounds.

The instant petitioner has argued that the Oklahoma Court of Criminal Appeals has adopted a broad and vague interpretation of the phrase "heinous, atrocious or cruel," by its finding that the petitioner in this case had "perpetrated a mass-murder by inflicting multiple gunshot wounds to his victims," 665 P.2d at 1202, and thus that the instant offenses were especially atrocious. Id. at 1203. The petitioner's argument that the Oklahoma Court of Criminal Appeals has used this circumstance as catchall is based on his contention that characterization of this incident, which is at most a "domestic dispute," as a mass-murder "is

ridiculous." Petitioner's Brief at 33.

This aggravating circumstance was approved as constitutionally valid on its face bv the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976), and the Oklahoma Court of Criminal Appeals adopted the definitions for such terms from the Florida Supreme Court. In the instant case, the jury was advised of these definitions. The jurors were instructed that the term "heinous" meant "extremely wicked or shockingly evil," that the term "atrocious" meant "outrageously wicked and vile," and that the term "cruel" meant "designed to inflicts a high degree of pain, utter indifference to, or enjoyment [of, the suffering of others, pitiless." Or. 65, 135.

The Oklahoma Court of Criminal

Appeals from its written opinions is aware that Godfrey requires consistent construction and application and in an effort to define those situations in which this circumstance is applicable has attempted to narrow the scope of the circumstance by considering not only the manner of killing but also the killer's attitude. Compare Odum v. State, 651 P.2d 703 (Okla. Crim. 1982) (single rendering victim immediately unconscious without evidence of physical or mental suffering, no aggravating circumstance) with Liles v. State, 702 P.2d 1025 (Okla. Crim. 1985)(victim stabbed seven times and left bleeding to death, aggravating circumstance present) and Thompson v. State, 57 Okla. B.J. 2129 (Okla. Crim. August 29, 1986) (victim severely beaten, leg broken, throat and

chest slashed and knew for some time that attackers ultimately planned to kill him, aggravating circumstance present).

While the United States Court of Appeals for the Tenth Circuit has expressed the view that the Oklahoma Court of Criminal Appeals has not been entirely consistent with regard to this circumstance, the Court finds that this case because of the events leading up to and the manner in which the instant murders were committed falls within that category of cases in which evidence of this aggravating circumstance has been appropriately and properly found. Cartwright v. Maynard, 802 F.2d 1203, 1221 (10th Cir. 1986)(even though state court has not been consistent in its, construction, departure is harmless

because once the evidence is measured against the correct standard killing in case satisfes test). The evidence revealed and the jury so found that the four victims packed and removed Kathy's personal and household belongings in the presence of the petitioner without incident, that they went back into the apartment for a final. check and were greeted by the petitioner with a gun, that the petitioner without warning began firing, that Dennis was shot twice in his head, and that Robert, who had apparently sought escape througyh, or refuse in, a bedroom, was found lying face down with his hands folded beneath him with one bullet wound in his back and one in the back of his head. The petitioner sought no medical aid for the wounded and dying but instead, in

fleeing to California, stopped first to pick up his paycheck at his place of employment and then to borrow a friend's car.

Accordingly, the Court finds that application of this aggravating circumstance is constitutionally proper in this instance and that two sentences of dcath based upon such evidence were not the result of caprice or emotion.

The sixth and seventh grounds asserted by the petitioner in support of his requested relief are that the instructions submitted by the trial court to the jury at the close of the second stage violated the eighth and fourteenth amendments in that (1) they failed to define and explain the procedure of weighing mitigating and aggravating circumstances, (2) they

failed to clearly inform the jury of its right to recommend a life sentence and (3) they impermissibly shifted the burden of proof to the petitioner to prove that his life should be spared.

Title 21, section 701.11 of the Oklahoma Statutes requires a finding of at least one of the statutory aggravating circumstances or a finding that such is outweighed by the finding of one or more mitigating circumstances before the death penalty can be imposed and the jury was so instructed. Or. 62, 132, 69, 139. Specific standards for balancing the aggravating and mitigating circumstances however were not provided but the same are not constitutionally required. E.g., Zant v. Stephens, 462 U.S. 863, 875-76 n.13 (1983) ("joint opinion issued . . . in Jurek . . .

makes clear that specific standards for balancing aggravating against mitigating circumstances are not constitutionally required").

The Court has reviewed Instruction No. 5 which the petitioner as challenged as deficient as well as Instruction No. 12 and in viewing the instructions as a whole the Court finds that the jurors were given adequate guidance to enable them to perform the function of determining if evidence of the six enumerated mitigating circumstances existed, if any additional mitigating outweighed any circumstances existed and if such circumstances aggravating circumstances found to exist. In light of the same, the Court finds little merit to the petitioner's contention that the jurors were unable to evaluate

and process the evidence offered by the petitioner during the penalty phase.

The Court likewise finds that the jury was properly the sufficiently guided in its determination of whether death was approrpriate punishment in this specific case and that no burden was impermissibly shifted in the penalty stage to the petitioner. Accordingly, these grounds do not mandate a finding that the reliability of the death sentence in this instance is questionable.

The eighth ground advanced by the petitioner is that jury instructions as a whole violated the due process clause of the fourteenth amendment by improperly shifting the burden of proof to the petitioner in the guilt-innocence phase of the trial. The Court has

carefully reviewed the petitioner's arguments pertaining to this issue and has carefully examined each of the instructions about which the petitioner has complained and has evaluated the cumulative effect of such instructions. In so doing the Court finds that the petitioner's arguments are without merit. No burden was impermissibly shifted to the petitioner and the instructions contained no mandatory presumption. The instructions as a whole adequately and properly instructed the jury as to the law, the state's burden of proof and the petitioner's defense of self-defense. See Rose v. Clark, 54 U.S.L.W. 5023 (July 2, 1986).

In his final proposition of error, the petitioner has argued that his

rights under the eighth and fourteenth amendments were violated by the state's failure to conduct the required proportionality review since at the time of his trial and of the subsequent appellate proceedings, Oklahoma law required the state appellate court to determine "[w]hether the sentence of death [was] excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." 21 O.S. § 701.13(C)(3) (1976); see id. § 701.13(C) (effective July 16, 1985). Oklahoma law also required the state appellate court to "include in its decision a reference to those similar cases which it took into consideration." Id. §§ 701.13(E). The petitioner has argued, in the alternative, should no

review be constitutionally required, that the state nevertheless violated the petitioner's rights in that it failed to follow its own procedural rules and statutes.

The petitioner has contended that his case "is the only case wherein no cases were compared before affirmance of his death sentence." Petitioner's Brief at 53, and he has challenged the excessiveness of the sentence not only as it pertains to the appropriateness of the same in this particular instance but also as it compares with punishment imposed on others convicted of the same crime. The petitioner's argument is again premised on his theory that this case involves mere "domestic violence"'and that Oklahoma courts are reluctant to impose the death penalty in

cases involving violence of this nature. See Munn v. State, 658 P.2d 482 (Okla. Crim. 1983) (death penalty inappropriate where accused has killed a close family member without provocation and raised a reasonable doubt as to mental competency at time of crime).

The United States Supreme Court has stated that a state court, before it affirms a sentence of death, need not under the eighth and fourteenth amendments compare the sentence with the penalties imposed in similar cases, Pulley v. Harris, 465 U.S. 37, 43-44 (1984),. and noted that "[w]hile . . some form of meaningful appellate review is required," id. at 45, comparative review is not. Id. at 50.

The Oklahoma Court of Criminal Appeals on direct appeal without

including citation to those cases which it reviewed and upon which it relied did state that "the sentence of death [was] not excessive or disproportionate to the penalty imposed in similar cases after considering both the crime and the defendant." 665 P.2d at 1204. In its Order affirming the denial of the petitioner's post-conviction application, the state court found that the petitioner's complaint of disproportionality "was thoroughly treated . . . on direct appeal . . . . Notwithstanding petitioner's contention, this Court views petitioner's situation as-being more than a mere 'domestic incident,' the jury believed it was a planned murder of two unarmed men." Order Affirming Denial of Post-Conviction Relief at 2.

The type of comparative review set forth in section 701.13 has been described as "an additional safeguard against arbitrarily imposed death sentences," 465 U.S. at 50, and while citation of those cases upon which a reviewing court relies is statutorily prescribed, the absence of such citation is not so critical in this instance that its absence is violative of the petitioner's constitutional rights. The appellate court engaged, not once, but twice, in the statutory inquiry and the Court finds, under the circumstances the fact that the state court failed to list those cases it considered in making its determination does not give rise to a finding by this Court that the death penalty was arbitrarily imposed in this instance or amount to a denial of any

other constitutional rights. Furthermore this Court has reviewed. numerous other cases in which the death penalty was imposed by juries of this state and in so doing finds little merit to the petitioner's contention that the sentences of death he received were excessive or disproportionate.

Accordingly, the Court finds based upon the foregoing that the petitioner, Charles William Davis, is not entitled to the relief that he has requested in his Petition for Writ of Habeas Corpus and that his motion for an Evidentiary hearing is DENIED and that his Petition for Writ of Habeas Corpus should be and is hereby DISMISSED.

ENTERED this 31st day of March, 1987.

S/Lee R. West
LEE R. WEST
UNITED STATES DISTRICT JUDGE

Entered in Judgment Docket on 3-31-87.

ORIGINAL

Supreme Court, U.S.
FILED
JUN 19 1989
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No. 88-1878

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JAMES SAFFLE, WARDEN,
OKLAHOMA STATE PENITENTIARY,
GARY MAYNARD, DIRECTOR
OKLAHOMA DEPARTMENT OF
CORRECTIONS,
ROBERT H. HENRY,
ATTORNEY GENERAL OF
OKLAHOMA,

PETITIONERS,

vs.

CHARLES WILLIAM DAVIS,
Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Can a state seek certiorari on a federal question where the outcome cannot be altered because there is an independent federal constitutional ground requiring relief.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

JAMES SAFFLE, Warden, Oklahoma State Penitentiary, GARY MAYNARD, Director, Oklahoma Dept. of Corrections, and ROBERT H. HENRY, Attorney General of Oklahoma,	)	
Petitioners	)	88-1878
vs.	)	
CHARLES WILLIAM DAVIS,	)	
Respondent.	)	

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI[1]

STATEMENT

Respondent, CHARLES DAVIS, was sentenced to die for the shooting of his brother-in-law and brother-in-law's friend. The jury, while rejecting the aggravating circumstance, that there existed a probability the Defendant would commit criminal acts of violence which would constitute a continuing threat to society, found Respondent knowingly created a great risk of death to more than one person, the murders especially heinous, atrocious or cruel, the Respondent had previously been convicted of a felony involving the use or threat of violence to the person and sentenced Respondent to death.

The evidence in the first stage of the trial showed Respondent shot and killed Robert Wayne Jones, his brother-in-law, and Dennis McLaughlin, after Mr. Jones, Respondent's wife, another brother and McLaughlin had come to his home in Oklahoma

---

[1]The unanimous opinion in the United States Court of Appeals for the 10th Circuit sets out more fully the factual and procedural history in this case. See Petitioners's Appendix A at 1-9. References in parentheses in this section are to the transcript of the trial, TR or to the original record or supplemental record in state court, OR.

City at 5:30 o'clock in the morning to remove her possessions. (Tr. 340, 348). Respondent wounded both his wife and her other brother at the same time. (Tr. 348). The shooting occurred after all of Respondent's wife's belongings were withdrawn from his house and a dispute arose, at which time the people in the house were shot. The jury rejected Respondent's claim of self defense.

During the second stage of the trial proceedings, the State of Oklahoma introduced into evidence a certified copy of the judgment and sentence of Respondent's 1942 conviction for murder. (Tr. 835). Thereafter, the evidence admitted in the first stage of the trial was incorporated into the second stage (Tr. 837) and the state rested.

Respondent called numerous witnesses to testify to his good work record and dependability and love for his wife. (Tr. 841).

Respondent testified in his own behalf that he attended school for only eight (8) years and he had not had any fights for over twenty-eight (28) years. (Tr. 861). He stated he had not been in trouble since 1942 when he was convicted of murder in Missouri. (Tr. 861). A tape recording was introduced into evidence of a statement Respondent had recorded for his wife just prior to their marriage about their age differences and other problems they had to face and his love for her.

Respondent's jury was instructed that: "The term heinous, as that term is used in these instructions, means extremely wicked or shockingly evil, and that atrocious means outrageously wicked and vile: and cruel means designed to inflict a high degree of pain, utter indifference to, or enjoyment of the suffering of other; pitiless." (O.R. 135). Respondent's counsel attempted to get the court to give an instruction that guided the jury's discretion on this circumstance to include some type of

unnecessary torturous activity, but that instruction was refused. (Supp. O.R. 14).

Additionally, in the penalty stage, the jury was given the following instruction "You should not allow sympathy, sentiment or prejudice to affect you in reaching your decision. You should avoid any influence of passion, prejudice or any other arbitrary factor when imposing sentence." (O.R. 70). The prosecutor, in his arguments to the jury reiterated the comments regarding sympathy

> "You're instructed in the instructions that you should not let sympathy affect your judgment and that is a kind of a hard instruction. Think about that. That you are put in a jury box and they say: 'Don't let sympathy affect your judgment.' Why do they do that? Well, because you see over the door there there are Scales of Justice and you are a part and become, really the Scales of Justice and so you must weigh these decisions, and you weigh them impartially and without sympathy. You must do that, so what does that mean? Well, you have heard us speak for a moment of the statutory aggravating circumstances. Because it is the law which compels, and I believe we properly understood and read in the facts of this case which compel you to return the death penalty."

(Tr. 896).

Additionally, the prosecutor noted

> "Well, I know you will consider the matters carefully. I know that you will consider them as you are, as a part of this court. As an arm of the law and an arm of justice. And that is what must be done. You must consider without sympathy. You must consider it on the evidence, and when you have found these four aggravating circumstances and consider what there is in mitigation, if anything, then, you see maybe from the beginning none of us have really had any choice."

(Tr. 908).

REASONS FOR DENYING THE WRIT

The United States Court of Appeals for the Tenth Circuit remanded this case to the District Court with directions to enter judgment denying the Writ of Habeas Corpus and enjoining the execution of Respondent under the invalid death sentence. The judgment was without prejudice to further proceedings by the

state for redetermination of sentence. See PET.APP A at 54. The decision of the Court of Appeals rests upon two independent federal constitutional grounds and the relief Respondent seeks would amount only to an advisory opinion and would have no effect upon the judgment of the Court of Appeals.[2]

Petitioner seeks certiorari on only one of two independent grounds from which the Circuit Court granted relief. Acceptance of certiorari by this Court would be a severe waste of the Court's time and resources. The state is asking for an advisory opinion on only one of the issues in which the Circuit Court enjoined the infliction of the death penalty. As a general rule, federal courts will not give advisory opinions. Wright, Miller and Cooper, Federal Practice and Procedure, 2d Vol. 13, p. 293 (1986). This Court, by granting certiorari, would be looking at issuing a mere advisory opinion. This Court, in another context dealing with separation of powers concerns, has stated,

> "The implicit policies embodied in Article III and not history alone, imposed the rule against advisory opinions on federal courts ..."

Flast v. Cohen, 392 U.S. 83, 96-97 (1968).

The use of certiorari to answer unnecessary questions which would not change the result of enjoining the death sentence in the instant case, wastes the scarce resources of this Court.

The United States Court of Appeals for the Fifth Circuit in Pressly v. Wainwright, 540 F.2d 818, 821, [5th Cir. 1976] cert.

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[2]The Court of Appeals decisions enjoining the execution of the death sentence was based on the Circuit's conclusion that the aggravating circumstance that the murders were especially heinous, atrocious or cruel was unconstitutionally vague and over broad, as enunciated by this court in Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853 (1988) and Godfrey v. Georgia, 446 U.S. 420, 428, as well as the fact that the sympathy instruction directed the jury to remain unaffected by sympathy, creating a risk that the jury discounted Respondent's evidence in reaching its sentencing conclusion. The Circuit concluding that the instruction was over broad and not cured by the instructions as a whole.

denied 430 U.S. 987 (1977) has noted regarding Federal Court jurisdiction,

> "A prerequisite of this Court's jurisdiction is the existence of a case or a controversy which is justiciable. U.S. Const. art. III, § 2; Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-41, 57 S.Ct. 461, 81 L.Ed. 617 (1937). For this reason, federal courts refuse to consider a case or a controversy of a non-concrete or hypothetical nature. "It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. (Emphasis added). Aetna Life Ins. Co., supra at 241, 57 S.Ct. 461. Under the facts extant in Prisoner's case, the "if" voussior binding the State's argument together is hypothetical: a substitute counsel agreed to take Prisoner's case and was substituted. The result is an argument based on a nonexistent factual context. Where a concrete case exists, this Court will not and may not resolve a hypothetical case."

Additionally, in Environmental Defense Fund v. Alexander, 614 F.2d. 474, 480, [5th Cir. 1980] cert. denied, 449 U.S. 919, the Fifth Circuit, in concluding that the defense of latches had been established, noted "... the court's musings about how the case might have been decided on the merits if timely filed and if we would grant relief would surely be the rendering of an advisory opinion in violation of the constitutional stricture. See U.S. Const. art. III § 2; Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240-41, 57 S.Ct. 461, 464, 81 L.Ed. 617, 621 (1937)."

This Court has already granted certiorari in Saffle v. Parks, Number 88, 1264 wherein an instruction similar to the instruction given in Respondent's case will be looked at by this Court. In light of the obvious error in the failure to limit the aggravating circumstance especially heinous, atrocious and cruel as addressed by this Court in Maynard v. Cartwright, 486 U.S.

_____, 108 S.Ct. 1853 (1988)* this Court should deny certiorari.

CONCLUSION

For the reason stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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*Oklahoma law is unclear as to the effect of these constitutional errors on resentencing. See Pet. App. A at 52, 53. The Circuit Court opinion left it to the state court to address in the first instance. See also, Maynard v. Cartwright, 486 U.S. _____, 106 S.Ct. 1853, 1860 (1989).

CERTIFICATE OF SERVICE

I hereby certify that I am attorney of record for Respondent Charles William Davis, and that I served the annexed Brief for the Respondent in Opposition to Certiorari on Petitioners by delivering a copy to office of the Attorney General of the State of Oklahoma, addressed as follows:

Susan Dickerson
Assistant Attorney General
Room 112
State Capitol Building
Oklahoma City, Oklahoma 73105

All parties required to be served have been served.

Done this 16th day of June, 1989.

Robert A Ravitz

ROBERT A. RAVITZ

88-1878

AFFIDAVIT OF MAILING

I, ROBERT A. RAVITZ, counsel of record for respondent, Charles William Davis, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of June, 1989, within the time permitted for filing, I caused to be deposited in the United States mail, with first-class postage prepaid, one original and nine copies of the foregoing Brief for the Respondent in Opposition to Certiorari, addressed to the Clerk of the Supreme Court of the United States.

Robert A Ravitz
ROBERT A. RAVITZ

Subscribed and sworn to before me, a Notary Public at Oklahoma County, Oklahoma this 16th day of June, 1989.

[signature]
NOTARY PUBLIC

My Commission Expires:

July 1989
(SEAL)

88-1878

CERTIFICATE OF SERVICE

I hereby certify that I am attorney of record for Respondent Charles William Davis, and that I served the above and foregoing Motion for Leave to Proceed in Forma Pauperis for the Respondent by delivering a copy to the Office of the Attorney General of the State of Oklahoma, addressed as follows:

Susan Dickerson
Assistant Attorney General
Room 112
State Capitol Building
Oklahoma City, Oklahoma 73105

All parties required to be served have been served. Done this 16th day of June, 1989.

Robert A Ravitz
ROBERT A. RAVITZ

AFFIDAVIT OF MAILING

I, ROBERT A. RAVITZ, counsel of record for respondent, Charles William Davis, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of June, 1989, within the time permitted for filing, I caused to be deposited in the United States mail, with first-class postage prepaid, one original and nine copies of the foregoing Motion for Leave to Proceed in Forma Pauperis, addressed to the Clerk of the Supreme Court of the United States.

Robert A Ravitz
ROBERT A. RAVITZ

Subscribed and sworn to before me, a Notary Public at Oklahoma County, Oklahoma this 16th day of June, 1989.

Donna L Williams
NOTARY PUBLIC

My Commission Expires:

1 July 1991
(SEAL)